

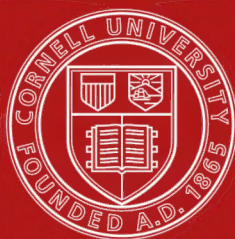
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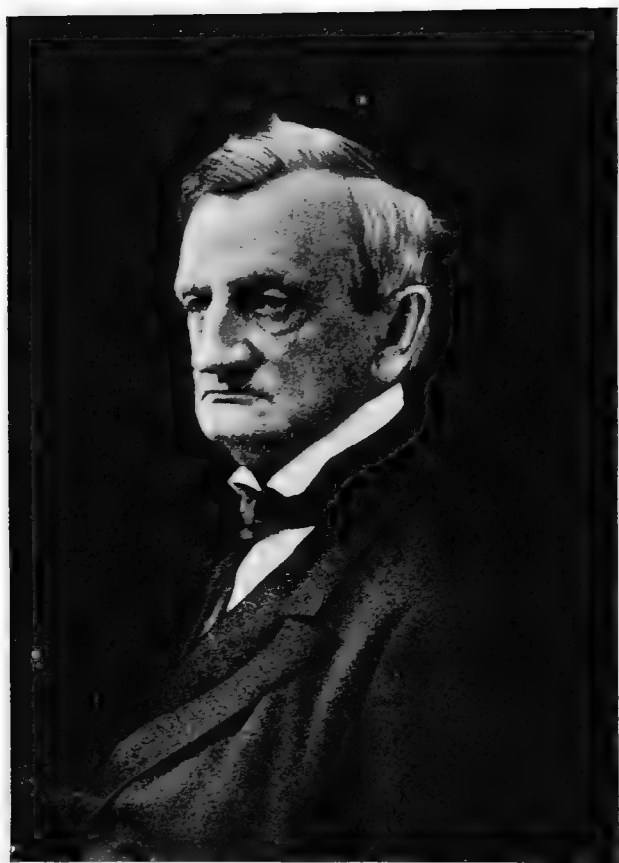
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GREAT AMERICAN LAWYERS



WILLIAM MAXWELL EVARTS

From a steel engraving after a photograph, taken in 1887 by Cox of
New York City.

Great American Lawyers

The Lives and Influence of Judges and
Lawyers Who Have Acquired Permanent
National Reputation, and Have
Developed the Jurisprudence of the
United States.

A HISTORY OF THE LEGAL PROFESSION
IN AMERICA

EDITED BY
WILLIAM DRAPER LEWIS

of the University of Pennsylvania
Dean of the Law Department

VOLUME VII

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CONTENTS OF VOLUME VII.

	PAGE
STEPHEN JOHNSON FIELD	1
BY JOHN NORTON POMEROY, JR., <i>of the California Bar.</i>	
AN EXAMINATION OF JUSTICE FIELD'S WORK IN CONSTITU- TIONAL LAW	52
BY HORACE STERN, <i>of the Pennsylvania Bar.</i>	
MORRISON REMICK WAITE	87
BY BENJAMIN RUSH COWEN, <i>Late Clerk of the United States Courts, Southern District of Ohio.</i>	
WILLIAM JOSEPH ROBERTSON	127
BY ARMISTEAD CHURCHILL GORDON, <i>of the Virginia Bar.</i>	
GEORGE VAN NESS LOTHROP	161
BY CHARLES ARTEMAS KENT, <i>of the Michigan Bar.</i>	
WILLIAM MAXWELL EVARTS	201
BY SHERMAN EVARTS, <i>of the New York Bar.</i>	
THOMAS A. HENDRICKS	245
BY LOUIS B. EWBANK, <i>of the Indiana Bar.</i>	

	PAGE
JAMES OVERTON BROADHEAD . . . 279 BY JAMES HAGERMAN, <i>of the Missouri Bar; Ex-President of the American Bar Association.</i>	
THOMAS READE ROOTES COBB . . . 309 BY SYLVANUS MORRIS, <i>Dean of the Law Department of the University of Georgia.</i>	
JOHN RANDOLPH TUCKER 321 BY WILLIAM REYNOLDS VANCE, <i>Dean of the Law Department of the George Wash- ington University.</i>	
MATTHEW P. DEADY 355 BY HARRISON GRAY PLATT, <i>of the Oregon Bar.</i>	
STANLEY MATTHEWS 393 BY CHARLES THEODORE GREVE, <i>of the Ohio Bar.</i>	
THOMAS MCINTYRE COOLEY 429 BY HARRY BURNS HUTCHINS, <i>Dean of the Law School of Michigan University.</i>	
MATTHEW HALE CARPENTER 493 BY JOHN BOLIVAR CASSODAY, <i>Late Chief-Justice of Wisconsin.</i>	
ROBERT COMAN BRICKELL 537 BY PETER JOSEPH HAMILTON, <i>of the Alabama Bar.</i>	

ILLUSTRATIONS IN VOLUME VII.

WILLIAM MAXWELL EVARTS

From a steel engraving after a photograph, taken in 1887 by
Cox of New York City *Frontispiece*

STEPHEN JOHNSON FIELD

From a photograph in possession of Judge Field's daughter,
Mrs. Whitney, taken in 1890 3

MORRISON REMICK WAITE

From a photograph by Lisdeath, 1888 89

WILLIAM JOSEPH ROBERTSON

From a photograph taken when Judge Robertson was sixty-
five years of age 129

GEORGE VAN NESS LOTHROP

From a photograph by Bergasnadeo of St. Petersburg, Russia,
taken when Mr. Lothrop was Minister to Russia . . . 163

THOMAS A. HENDRICKS

From a steel engraving. Artist unknown 247

JAMES OVERTON BROADHEAD

From an engraving executed from a photograph, taken when
Mr. Broadhead was about seventy-six years of age . . . 281

THOMAS READE ROOTES COBB

OPPOSITE PAGE

From a photograph taken when General Cobb was about
 forty years of age. The picture shows the General taken
 in his Confederate uniform 311

JOHN RANDOLPH TUCKER

From a photograph taken when Professor Tucker was about
 fifty-five years of age 323

MATTHEW P. DEADY

From a photograph taken in 1891, when Judge Deady was
 sixty-seven years of age 357

STANLEY MATTHEWS

From a photograph by Bell of Cincinnati, 1886 395

THOMAS MCINTYRE COOLEY

From a photograph by Randall 431

MATTHEW HALE CARPENTER

From a large photograph by Sein of Milwaukee. The photo-
 graph is the property of Mrs. Carpenter and is reproduced
 by her permission 495

ROBERT COMAN BRICKELL

From a photograph taken when Judge Brickell was in his
 seventieth year 539

STEPHEN JOHNSON FIELD.

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From a photograph in possession of Judge Field's daughter, Mrs. Whitney, taken in 1890.



STEPHEN JOHNSON FIELD.

1816-1899.

BY

JOHN NORTON POMEROY, JR.,¹

of the California Bar.

THE subject of this memoir belongs to a remarkable family—a family which well illustrates the effects of American civilization and institutions working upon the best New England character. Commencing their careers with no advantages except the early training of God-fearing and godly parents, and the education afforded by the country academy and college, four members of the family, consisting of the brothers David Dudley Field, Cyrus West Field, Stephen Johnson Field, and Henry Martyn Field, all rose to distinction.

“Stephen Johnson Field was born in Haddam,

¹ In 1880-81 my father, Professor Pomeroy, wrote an introduction to a privately printed volume entitled, “Legislative and Judicial Labors of Judge Field,” which was, for the chief part, a compilation of his most important decisions, prepared by two of his friends. Professor Pomeroy was peculiarly fitted by his position as professor of law in the University of California, by his keen interest in the many distinctive features of California law, by his studies in constitutional law, and by his intimacy with Judge Field, to appreciate the scope and importance of the latter’s judicial career. The parts in quotations are taken from my father’s paper. The portions of that

Connecticut, on the 4th of November, 1816. His grandfathers on both his paternal and maternal sides served as officers in the Revolutionary War, and were descended from Puritan stock, their ancestors being among the earliest settlers of New England. In 1819, when he was about three years old, his father, who was a Congregationalist clergyman, removed to Stockbridge, Massachusetts, and Stephen's childhood and early youth were there passed in what has become one of the most famous and classic spots of New England. At the age of thirteen, a step was taken by him which undoubtedly produced a deep and lasting impression upon his intellectual and moral character, although its effects upon his external life were temporary and trifling. In 1829 an elder sister married the Reverend Josiah Brewer.² Mr. and Mrs. Brewer, acting under the auspices of The Ladies' Greek Association in New Haven, soon afterwards sailed for the Levant, with the intention of establishing schools in Greece for the education of women. They invited Stephen to accompany them. His brother, David Dudley, who as the eld-

paper dealing in detail with Judge Field's work as a state and Federal judge are omitted. My additions comprise, chiefly a few stirring incidents from Judge Field's early career in California; an account of the Neagle-Terry affair, and other data concerning the last eighteen years of his life. My chief source, besides the United States Reports, information supplied by Judge Field's relatives, and his correspondence with Professor Pomeroy, has been that most delightful book of autobiographical sketches — privately printed — Judge Field's own "Personal Reminiscences of Early Days in California, with other Sketches," 1877; 2d ed., 1893, cited as "Early Days."

² Mr. Justice Brewer, of the Supreme Court, is their son.

est of the family took a deep and active interest in promoting the welfare of the younger members, advised him to go for the purpose of studying the Oriental languages, thinking that he could thereby qualify himself for a professorship of Oriental languages and literature in some of the American Universities. With this design he accompanied his sister and brother-in-law. They sailed December 10th, 1829, and arrived at Smyrna, February 5th, 1830. Mr. Brewer there changed his original plan and established a school at Smyrna. Stephen remained in the Levant two and a half years. In addition to the time spent at Smyrna he visited many of the islands of the Grecian Archipelago, and famous cities of Asia Minor, and passed one winter in Athens in the family of the Reverend John Hill, the well-known American missionary of the Episcopal Church. During this residence in the East, Stephen learned the modern Greek so that he was able to write and to speak it with ease, and acquired some knowledge of the French, Italian, and Turkish. The most important and lasting result of the time thus spent in the East during the plastic period of his youth, was a moral one; and the lesson which he there learned was that of religious toleration. He had been brought up as a boy in the strictest tenets of Calvinism. As he says of himself, "he had been taught to believe that the New England Puritans possessed about all the good there was in the religious world," and to look with distrust upon all

the great historical churches which they, with one sweeping condemnation, called Nominal Christians. During his Eastern life he was thrown into close contact with Roman Catholics, members of the Greek Church, and Armenians, as well as with Mahometans; he saw examples of the highest faith, devotion, piety, and virtue among them all, and was profoundly impressed by them. Indeed, his views underwent an entire revolution; and there was laid the foundation of that broad tolerance which was always a distinguishing element of his character.

"He returned to the United States during the winter of 1832-3; entered Williams College in the fall of 1833, and was graduated in 1837, having obtained the highest honors of his class—the Greek oration at the Junior Exhibition, and the valedictory oration at the Commencement. He entered upon the study of law during the spring of 1838, in the office of his brother, David Dudley, in New York City, and was admitted to the bar in 1841. A portion of this interval he spent in Albany, giving some instruction to classes of the Albany Female Academy, and pursuing his studies in the office of John Van Buren, then the Attorney-General of the state, and at the summit of his brilliant but disappointing career. On being admitted to the bar, Stephen and his brother formed a partnership in New York City, which continued until the year 1848. On the breaking out of the Mexican War, and again at its close, David Dudley urged his brother to remove to

California, making generous offers of pecuniary means for investment in the purchase of land, but Stephen had a strong desire to visit Europe, and declined the proposal. He sailed for Europe in June, 1848, with the design of making an extensive tour. While in Paris, the following winter, he read the annual message of President Polk to Congress, which officially announced the discovery of gold in California. He then felt some regrets that he had not acted upon the advice of his brother, but nevertheless concluded to visit the most interesting parts of Europe before returning. He did so, and returned to New York in the fall of 1849, arriving on the 1st of October. Soon afterwards he left for California."

Mr. Field arrived in San Francisco, via Panama, on the 28th of December, 1849, after a most dangerous voyage on an overcrowded and fever-stricken vessel. His funds were almost exhausted. Of the ten dollars which he had on landing, seven dollars went for the cartage of his two trunks. Speaking of this, his first day in California, he says:³

The next morning I started out early with three dollars in my pocket. I hunted up a restaurant and ordered the cheapest breakfast I could get. It cost me two dollars. A solitary dollar was, therefore, all the money in the world I had left, but I was in no respect despondent over my financial condition. . . . There was something exhilarating and exciting in the atmosphere which made everybody cheerful and buoyant. As I walked along the

³ Early Days, pp. 7, 8.

streets, I met a great many persons I had known in New York, and they all seemed to be in the highest spirits. Everyone in greeting me, said "It is a glorious country," or, "Isn't it a glorious country?" or "Did you ever see a more glorious country?" or something to that effect. In every case the word "glorious" was sure to come out. . . . I had not been out many hours that morning before I caught the infection, and though I had but a single dollar in my pocket and no business whatever, and did not know where I was to get the next meal, I found myself saying to everybody I met, "It is a glorious country."

Luckily, he had in his pocket book (but almost forgotten) the promissory note for \$400 of a well-known pioneer, Colonel Stevenson, which his brother David Dudley had intrusted to him for collection; and in the course of the morning's ramble, this gentleman's flaring office sign attracted his attention. He thus describes his interview with the Colonel:⁴

Of course I immediately entered the office to see the Colonel. He had known me very well in New York, and was apparently delighted to see me, for he gave me a most cordial greeting. After some inquiries about friends in New York, he commenced talking about the country. "Ah," he continued, "it is a glorious country. I have made two hundred thousand dollars." This was more than I could stand. I had already given him a long shake of the hand, but I could not resist the impulse to shake his hand again, thinking all the time of my financial condition. So I seized his hand again and shook it vigorously, assuring him that I was delighted to hear of his good luck. We talked over the matter, and in my enthusiasm I shook his hand a third time, expressing my satisfaction at his good fortune. We passed a long

⁴ Early Days, pp. 12, 13.

time together, he dilating all the while upon the fine country it was in which to make money. At length I pulled out the note and presented it to him. I shall never forget the sudden change, from wreathes of smiles to an elongation of physiognomy, expressive of mingled surprise and disgust, which came over his features on seeing that note. He took it in his hands and examined it carefully; he turned it over and looked at its back, and then at its face again, and then, as it were, at both sides at once. At last he said, in a sharp tone, "That's my signature," and began to calculate the interest; that ascertained, he paid me the full amount due. . . . If it had not been for this lucky incident, I should have been penniless before night.

After two weeks in San Francisco, Mr. Field resolved to try his fortune in the interior. Landing from the steamer at the nearest point on navigable water to what was then the most populous mining region in the state, he found there a "tent city" of between five hundred and one thousand persons. Impressed by the advantages and beauty of its location, he at once determined to make it his home. Within an hour of his arrival he became a person of much consequence by subscribing to town lots to the amount of \$16,250,—and this, with but twenty dollars left to him of Colonel Stevenson's money! It is only fair to say, however, that such subscriptions were not considered binding contracts, but rather expressions of confidence in the town's future. At a social gathering the following evening, in honor of the arrival and erection of the first frame house in the settlement, he seized the occasion to urge the organization of a town government; his remarks met

with general favor, and were promptly carried into execution at a public meeting the next morning. At the exciting election⁵ which followed, that same afternoon, Mr. Field was chosen Alcalde of the new town; whose newly-fledged citizens, at a further meeting of the evening, proud of the almost unique distinction of the residence there of a respectable American woman, christened the place, amid waving of hats and loud hurrahs, "Marysville," in her honor.

The Alcalde was a judicial officer under the Spanish and Mexican laws, having a jurisdiction something like that of a justice of the peace; but in the anomalous condition of affairs in California at that time, he, as a matter of necessity, assumed and exercised very great powers. The first criminal case that came before the new magistrate will serve to illustrate his difficulties and his methods of meeting them. The crime was a robbery of gold dust—the most heinous of offenses in a new mining community. He procured the prisoner's indictment and trial in due form, the whole proceeding occupying only part of a day. His real trouble did not begin until after conviction. What was to be done with the prisoner? How was he to be punished? Imposing a fine would not answer; and, if he had been discharged, the crowd would have immediately hanged him. To send him to the chain-gang in

⁵ "The main objection urged against me was that I was a new-comer. I had been there only three days; my opponent had been there six. I beat him, however, by nine votes." *Early Days*, p. 21.

San Francisco was out of the question, since the steamer fare—fifty dollars—together with the expense of an officer to accompany the prisoner, and the price of a ball and chain, was more than the prosecution could afford, even if the crowd would consent to his removal. Under these circumstances he tells us there was but one course to pursue:⁶

However repugnant it was to my feelings to adopt it, I believe it was the only thing that saved the man's life. I ordered him to be publicly whipped with fifty lashes, and added that if he were found, within the next two years, in the vicinity of Marysville, he should be again whipped. I, however, privately ordered a physician to be present so as to see that no unnecessary severity was practiced. . . . The latter part of the sentence, however, was supererogatory; for there was something so degrading in a public whipping, that I have never known a man thus whipped who would stay longer than he could help, or ever desire to return. However this may have been, the sense of justice of the community was satisfied. No blood had been shed; there had been no hanging, yet a severe public example had been given.

As Alcalde, his authority, both criminal and civil, came to be respected for miles around. In addition to his duties as judicial officer, general supervisor, notary public, and registrar of deeds, he acted as a sort of universal arbitrator of controversies, settling rates of wages, freight charges and even matrimonial disputes. In this way he carried out his conception of the good Cadi of the village, from which term, *Al Cadi*, his own official designation, Alcade was derived.

⁶ Early Days, pp. 31, 32.

The arrival in Marysville, in June, 1850, of the first judge of that judicial district regularly appointed under the new Constitution, led to a temporary change in his fortunes. This person, one W. R. Turner, a Texan, was as ignorant of the first principles of law as he was violent in temper; and, withal, a man of very dissolute habits. In some way he conceived the idea that Mr. Field was an abolitionist. Mr. Field's first appearance in the district court, and his respectful exception to the Judge's adverse ruling on a motion was interpreted by the Judge, who knew nothing of the practice of the law, as a personal affront and resulted in a fine of \$500 and an order of imprisonment. No warrant accompanied the order, and Mr. Field was promptly released on *habeas corpus* by an inferior judge. Great excitement attended these events. Turner was burnt in effigy—of course without Field's connivance. He retaliated by ordering the imprisonment of Field, two of his friends, and the Judge who discharged him from arrest, and the expulsion of the former from the bar of the district. All these proceedings were soon set aside by the Supreme Court⁷ but the higher court's order for the restoration of Mr. Field and his friends was set at defiance by Turner, who continued to breathe forth threats against Field's life in the saloons and gambling

⁷ *People vs. Turner*, 1 California Reports, 143 (1850); *Ex parte Field*, *ibid.*, 187 (1850); *Ex parte Robinson*, 19 Wallace's Reports, 510-513 (1873).

houses of Marysville. Field sought the advice of Judge Bennett who was then one of the Supreme Court, and has left the following description of the interview:⁸

"Well," said the judge, "I will not give you any advice, but if it were my case, I think I should get a shotgun and stand on the street, and see that I had the first shot." I replied that "I could not do that; that I would act only in self-defense." He replied, "That would be acting in self-defense." When I came to California, I came with all those notions, in respect to acts of violence, which are instilled into New England youths; if a man was rude I would turn away from him. But I soon found that men in California were likely to take very great liberties with a person who acted in such a manner.

He accordingly followed Judge Bennett's advice to the extent of buying a brace of revolvers, and became somewhat proficient in the frontiersman's accomplishment of firing them from his coat pockets. Public knowledge of this determined attitude on Mr. Field's part had a wholesome effect upon his enemy; but, of course, his law practice, which had been very lucrative before Turner's arrival, was, for the time being, ruined.

Not long after these events, in the fall of 1850, Mr. Field found himself nominated by his friends as a candidate for the lower house of the Legislature. He accepted the candidacy, and was elected after a vigorous non-partisan campaign through the length and breadth of his district—which comprised an area of about five thousand square miles, chiefly rug-

⁸ *Early Days*, p. 53.

ged mountains. It is needless to say that Turner and his friends did all that was in their power to defeat this election.

An incident of the campaign is related by Judge Field with much feeling. One day, in the course of his journeyings, he came upon a Lynch jury sitting by the roadside, trying a man upon the charge of stealing gold dust. Across the road was a wayside saloon. After watching the trial for a while, and impressed by the man's appearance, he resolved upon the following sagacious course of action. On an occasion of some little delay in the proceedings, he mentioned to those present, the jury included, that he was a candidate for the Legislature, and that he would be glad if they would join him in a glass in the saloon, an invitation which was seldom declined in those days. It was at once accepted. While the jury was thus pleasantly engaged, Mr. Field improved the chance for a little private conversation with the prisoner. Convinced of his innocence, and touched by his friendless situation, the candidate hurried back to the saloon, in time to propose another drink, and cigars—"the best you have, Mr. Bar-keeper—it is not often that you have a candidate for the Legislature among you." Then, singling out the most benevolent looking man among the jury, Mr. Field proceeded to ply him with questions about his home and family. The eyes of the juror glistened. After a short pause, Mr. Field remarked:

What is the case against your prisoner? He too may have a mother and sister in the East, thinking of him as your mother and sister do of you, and wondering when he will come back. For God's sake remember this.

The heart of the good man responded in a voice which, Judge Field said nearly twenty-seven years afterwards sounded like a delicious melody in his ears: "I will do so." A third glass all round, and the young advocate thought it safe to speak to the jury about the trial. He told them that the courts of the state were organized; that the prisoner appeared to be without friends, and he appealed to them, as men of large hearts, to think how they would feel if they were accused of crime when they had no counsel and no friends; that it was better to send the prisoner to Marysville for trial, and keep their own hands free from stain. By good luck a wagon bound for Marysville came up at this moment; the jury were prevailed upon to put the prisoner in charge of the teamster, binding the latter under oath to deliver him to the sheriff; Mr. Field himself adding the sanction of a fifty dollar coin. Of all things which he could recall of the past, this was one of the most pleasant. He believed he saved the prisoner's life; for in those days there was seldom any escape for a person tried by a Lynch jury.

The extraordinary amount of legislative work that he accomplished during the ensuing four months' session is described below. Incidentally, the bill

reorganizing the judiciary effected the removal of Turner to a remote part of the state; proceedings instituted for the latter's impeachment miscarried, through a misapprehension on the part of some members as to Mr. Field's wishes in the matter.

Mr. Field was not yet rid of the Turner faction. A few weeks later, while calling on Mr. Broderick, afterwards Senator, in a hotel in San Francisco, he was astonished to find himself suddenly pushed into the street, with great violence, by his friend. "I demanded," says Judge Field, "an explanation. He then told me that he had noticed Vi Turner, a brother of the Judge, a man of desperate character, come into the bar-room, throw back his Spanish cloak, draw forth a navy revolver, and level it at me. Seeing the movement he had thrown himself between me and the desperado and carried me off." ⁹ This brave act on Broderick's part Mr. Field requited with years of devoted service in aid of Broderick's political fortunes.

"In order to appreciate the extent and importance of Judge Field's legislative work during his single term of office, and the lasting effect which it has produced not only upon California, but upon other and especially mining states, the anomalous condition of the law of the state and the administration of justice at that early day must be fully understood. The population was made up of emigrants from all parts of the United States, from European countries,

⁹ Early Days, p. 85.

from Australia, and even from the Pacific islands and China. In addition to this heterogenous mixture of all nationalities, was the element of native Mexican or Californian population. Among these early comers, some were men of high character, intelligence, and culture, well-fitted to be the leaders of society. A large number were of less education and culture, but still were full of energy, and, coming from the United States, were inclined to be law-abiding, possessing at least some of the American feeling of respect for the law and love of justice. A third, and it must be confessed, a large class, consisted of the worst characters of the older communities, rogues, knaves, gamblers, and professional criminals, acknowledging no law, and defying all law. And the law itself of the country was unsettled. The civil law, as formulated in Spanish codes and applied to Spanish colonies, and modified by Mexican legislation, prevailed prior to the cession of California to the United States. Large tracts of land were held by grantees under the colonization law of Mexico, or by their assigns. The Mexican law also contained provisions utterly unlike any doctrines of the common-law, concerning the organization of "pueblos" or towns, which were still the basis of proprietary and municipal rights of enormous value; and some regulations of mining, and the occupation of mineral territory, wholly different from the common-law rules applicable to the same subject-matters. The Mexican system of infe-

rior courts,—the “alcaldes” of the pueblos,—which was in operation at the time of the conquest, had been continued after the occupation by the United States, and was of necessity retained until a more complete judicial organization could be established under the territorial and state governments. Some confusion and difficulty also followed the substitution of another system of municipal law, and of judicial administration, constructed upon an American type, in place of the Spanish Mexican codes.

“The stream of immigrants which for several years poured into the state, coming from every village and hamlet in the United States, and from all parts of Europe, brought along with them their own customs, opinions, and preferences. At home they had been familiar with a great variety of laws, and they naturally preferred to follow those legal rules to which they had been accustomed. The eastern states had mostly been settled by a homogeneous population, all familiar with the common-law, and they adopted it without a question. The same was true with respect to the states of the Ohio and Mississippi Valleys. But it was not true of California; no such consent, no such homogeneity existed among the people of that state. And it was perceived by intelligent and thoughtful men, that the common-law of England, adopted by the first Legislature as a rule of decision in the courts, when not repugnant to the constitution and laws of the state, did not meet the exigencies and conditions of the country.

Many of its most characteristic and fundamental principles and doctrines were unfitted for the new commonwealth, partly from the anomalous condition of society, partly from the effect of the preëxisting system of Spanish-Mexico, and partly from a great variety of most important proprietary interests, titles, and modes of using property, unknown, and even directly antagonistic, to the common-law rules. In addition to this unsettled condition of the law, there were certain branches of industry of paramount importance, and certain kinds of proprietary rights and claims, at that time surpassing in value all others within the state, for which there was absolutely no authoritative law. These were the mining industries, the rights over mines, minerals, mining claims and works, and the water rights. The two, mining rights and water rights, were inseparably connected, and must stand or fall together. No legislation, either state or national, had yet been enacted concerning these subjects. The entire mass of common-law principles, doctrines, and rules dealing with minerals, mining, and inland waters, were utterly inapplicable to the existing condition of affairs, either to the physical nature of the mineral regions, or to the social nature of the persons actually engaged in mining. The enforcement of the common-law doctrines, even if possible, would have at once destroyed this industry, and arrested at one blow the magnificent development which had already begun. The intricate and restrictive system of the Spanish-

Mexican codes was equally inapplicable. The mineral lands, as a whole, belonged to the United States, as part of the public domain. Different opinions prevailed with respect to the ownership of the minerals themselves while still remaining in the soil. Some maintained that they belonged to the United States, others that they were owned by the state, but the conviction was universal among the settlers that neither the national nor the state government could or should assert any right of ownership. As a matter of fact, the immigrants from all the states, and from all countries, had poured over the mineral regions, settled down in every direction, appropriated parcels of the territory to their own use, and were prospecting and mining in every mode rendered possible by their own resources, under no law, and with no restraint except the danger of conflict with other and more powerful parties who could wield a greater physical force. The miners themselves, however, had taken some most important steps, which illustrate in the clearest manner the love of order and justice and respect for law which characterizes American-born citizens of all classes, and which prevented the most destructive consequences, which otherwise would have resulted from the utter absence of any municipal law. The miners were scattered over the territory in larger or smaller groups, located at different places, technically known as "camps." The dwellers in each camp had held meetings and had enacted rules and regulations by

which they agreed to be governed at that place. These rules were simple, but related to the most important questions of property, to priority in claims, and the extent of ground which one person could appropriate. The rules once adopted were enforced with rigor upon all settlers in the particular camp. This voluntary, self-imposed legislation originated with the American immigrants, and they were ordinarily so superior in numbers that they could compel obedience by the less law-abiding foreigners. The rules they adopted governed the extent of each individual claim at the particular locality, the acts necessary to constitute such an appropriation of a parcel of mineral land or portion of a stream as should give the claimant a prior right against all others, the amount of work which should give the claimant a right to continued possession and enjoyment, what should constitute an abandonment, and the like fundamental regulations. These rules differed in their details in the various camps, but there was still a general similarity among them all.

"In this condition the Legislature of 1851 was called upon to act. Mr. Field, as the result of accurate knowledge and careful study, determined upon a legislative policy. He understood the material upon which any legislation must work; he was familiar with the miners as a class, and knew their habits and peculiarities, their common sense and general love for fair play, coupled with strong will and occasional violence. He saw at a glance that

the Legislature could not enact any complicated system of mining laws which the miners could not appreciate nor even understand, and which would conflict with their own notions and habits. The plan which he finally concluded to propose, and, if possible, procure to be adopted, was simple, and its very simplicity may, at first blush, tend to obscure its wisdom; but all possible doubts in that respect have long since been settled by its complete success. The root idea of this plan was that the rules voluntarily imposed upon themselves by the miners should receive the sanction of the law, and as laws should be enforced by the courts in adjudicating upon mining rights and claims. He, therefore, drew up and offered to the Legislature the following provision, which, through his advocacy, was adopted and incorporated into a general statute regulating proceedings in civil cases in the courts of the state:

In actions respecting mining claims, proof shall be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing said claims, and such customs, usages, or regulations, when not in conflict with the Constitution and laws of this state, shall govern the decision of the action.

“The far-sighted sagacity, expediency, and wisdom of this short statute have been conclusively established by the experience of years throughout all the Pacific mining states and territories. The same fundamental principle of recognizing and giving the force of law to the local customs and rules of the miners has been continued without change

in the subsequent legislation of California, and has been incorporated into the statutes of the other mining states. It has also been accepted by Congress; and with some modifications in detail has been made the basis of the laws enacted for the government of the public mineral lands. No single act of creative legislation, dealing with property rights and private interests, has exceeded this one in importance and in its effects in developing the industrial resources of the country.¹⁰

"The enactment gave the force of law to an equitable system of mining and water regulations, and has been the direct means of promoting and protecting an industry which has secured and added an untold amount to the total wealth and resources of the country.

"In addition to the provision concerning mining claims, Mr. Field was also the author of many other measures of the greatest importance to the state, which was then just commencing its wonderful course of development. Being a member of the Judiciary Committee, his work naturally related, in the main, to the administration of justice. Among the most important of these measures, planned and drawn up by him, was a bill concerning the judiciary of the state. This act was general, dealing with the whole judicial system, and requiring great

¹⁰ The causes, nature, and consequences of this legislation cannot be better described than in the language of Judge Field himself, in *Jennison vs. Kirk*, 98 United States Reports, 457 (1878).

labor in its preparation. It completely reorganized the judiciary, and defined and allotted the jurisdiction, power, and duties of all the grades of courts and judicial officers.

"He also prepared and introduced two separate bills to regulate the civil and criminal practice. These acts were based upon the Code of Civil Procedure, and the Code of Criminal Procedure proposed by the New York commissioners, but they contained a great number of changes and additions made necessary by the provisions of the California constitution, and by the peculiar social condition and habits of the people. They were by no means bare copies taken from the New York Codes, since Mr. Field altered and reconstructed more than three hundred sections and added over one hundred new sections. The two measures were generally designated as the Civil and the Criminal Practice Acts. They were subsequently adopted by the other states and territories west of the Rocky Mountains. They continued with occasional amendments in force in California until the present system of more elaborate codes was substituted for them in 1873; and even this change was more in name than in substance, since all their provisions substantially reappear in some one of these codes.

"In the Civil Practice Act he incorporated the provision above mentioned respecting mining claims. He also incorporated into it another provision, which has become a permanent feature of the legislative

policy of California, and has proved of inestimable benefit to its population—the provision exempting the property of judgment debtors from seizure and sale upon execution. Some exemption has long been found in the statute-books of every state, but it has ordinarily been small in amount and value, restricted to householders, and extending only to a few articles of absolute necessity for the existence of a family—such as a little kitchen and bedroom furniture, bedding, clothing, and a few other similar articles. Mr. Field justly thought that the scheme of exemption should, especially in a new state, be planned after another policy,—a policy of generosity as well as of strict justice, believing that even the strictest justice and the claims of creditors would be better subserved thereby. The fundamental principle of the plan proposed by him was, that every person, in addition to those articles necessary for the individual preservation, such as clothing, reasonable household furniture and effects, and the like, should be secured in the possession and use of those things by which, as necessary means and instruments, he pursues his profession, trade, business, or calling, whatever it may be, and acquires the ability of paying the demands of creditors. This law, therefore, exempts not only household furniture and the like, but implements, wagons, teams, and cattle of a farmer, tools of a mechanic, instruments of a surveyor, surgeon, and dentist, the professional library of a lawyer and a physician, articles used by

the miner, the laborer, etc. At that time there was no exemption whatever of personal property in California, and none equally extensive to be found in the previous legislation of any state of the Union. It is understood by those who were familiar with Judge Field, that throughout his life he looked back with greater satisfaction upon the exemption system which he thus created than upon any other of his legislative work.

"The foregoing summary shows an enormous and altogether unprecedented amount of legislative work, conceived, prepared, perfected, and accomplished by one man in a single session of only a few months in duration. The influence of this legislation upon the people and the material prosperity of California has been simply immeasurable; but it has not been confined to the limits of a single state; it has extended over the entire Pacific slope, and especially through all the mining regions."

Mr. Field returned from the Legislature to Marysville, rich in reputation, but ruined in fortune. Business ventures in which he had engaged during the interval when his practice was interrupted by his disbarment had proved disastrous; and his campaign expenses, which, as candidate without a party, he had borne unaided, had been very large. With exactly eighteen and three-quarters cents in his pocket, he faced some eighteen thousand dollars of debts, all bearing interest at the current rate of ten per cent. *per month!* But the demands he made

upon the assistance of his friends were not excessive. He says:¹¹

I found a small house, thirty feet by sixteen, for an office, at \$80.00 a month, and took it. It had a small loft or garret, in which I placed a cot that I had purchased upon credit. Upon this cot I spread a pair of blankets, and used my valise for a pillow. I secured a chair without a back for a wash-stand, and with a tin basin, a pail, a piece of soap, a toothbrush, a comb, and a few towels, I was rigged out. I brought myself each day the water I needed from a well near by. I had an old pine table and a cane-bottomed sofa, and with these and the bills which had passed the Legislature, corrected as they became laws, and the statutes of the previous session, I put out my sign as an attorney and counsellor-at-law, and began the practice of my profession.

His practice soon became very lucrative; indeed, as Marysville grew to be an important town of 8,000 or 10,000 inhabitants, he had, for some time, the largest business of any lawyer in the state, outside of San Francisco. His fees, of course, were moderate, judged by present-day standards; but within two years and a-half he paid off all his indebtedness, amounting with accumulations of interest to over \$38,000.

The Turner trouble was not the only one of the kind in which Mr. Field was involved. In 1853 he was challenged to a duel by another Marysville superior judge, whose election he had opposed. This gentleman—one Barbour, also a southerner—lacked something of the courage of his race; at the time and place appointed for the meeting he withdrew from

¹¹ Early Days, p. 93.

the contest, without explanation or apology. This fiasco, naturally, resulted in much public merriment at Barbour's expense. What resulted may be related in Judge Field's own words:¹²

On the following morning, whilst in front of my office gathering up kindling-wood for a fire, and having my arms full—for each man was his own servant in those days—Barbour came up and, placing a cocked navy revolver near my head, cried out, "Draw and defend yourself." As I had not observed his approach I was taken by surprise, but turning on him I said, "You infernal scoundrel, you cowardly assassin—you come behind my back and put your revolver to my head and tell me to draw; you haven't the courage to shoot; shoot and be damned." There were at least ten witnesses of this scene; and it was naturally supposed that having advanced so far he would go farther; but as soon as he found I was not frightened, he turned away and left me.

One of his cases was recalled by Judge Field in later years with especial pleasure. It concerned the title to a placer mining claim which shortly afterwards yielded its owners \$90,000 in gold dust in a single week. Bribery on the other side was unconcealed; indeed, Mr. Field himself overheard part of the negotiations with the jurors through the canvas walls of his tent. On the next day, the saloon in which the trial was held was crowded with spectators, most of whom were partisans of the other side. After reviewing the evidence before the jury for three hours, Mr. Field said:¹³

¹² Early Days, p. 110.

¹³ Early Days, pp. 100-102.

"Gentlemen, we have not endeavored to influence your judgment except by the evidence; we have not approached you secretly and tried to control your verdict. . . . But the other side have not thus acted . . . they have said that you were so low and debased that although you had with uplifted hands declared that so might the ever-living God help you, as you rendered a verdict according to the evidence, you were willing, to please them, to decide against the evidence, and let perjury rest on your souls. I know that you (pointing to one of the jurors) have been approached. Did you spurn the wretch away who made a corrupt proposal to you, or did you hold counsel, sweet counsel with him? I know that you (pointing to another juror) talked over this case with one of the other side at the house on the hill last night, for I overheard the conversation—the promise made to you and your pledge to him. . . . I was there and overheard the foul bargain." At this thrust there was great excitement, and click, click, was heard all through the room, which showed a general cocking of pistols; for every one in those days went armed. I continued: "There is no terror in your pistols, gentlemen; you will not win your case by shooting me; you can win it only in one way—by evidence showing title to the property; you will never win it by bribery or threats of violence. I charge openly attempted bribery, and if what I say be not true, let the jurors speak out now from their seats. Attempted bribery, I say—whether it will be successful bribery, will depend upon what may occur hereafter. If, after invoking the vengeance of Heaven upon their souls should they not render a verdict according to the evidence, the jurors are willing to sell their souls, let them decide against us."

The jury, after a few minutes' consultation, returned a verdict in favor of Mr. Field's client.

In the fall of 1857, he was elected a justice of the State Supreme Court for the term of six years, commencing on the first of January, 1858. A vacancy

occurring on the bench through the death of one of the justices, he was appointed by the governor for the unexpired term, and took his seat on the 13th of October, 1857. On the resignation of Chief-Justice Terry, in September, 1859, he became Chief-Justice. He remained in this high office until 1863, when he was removed to a still higher position—a seat on the Supreme Court of the United States.

“The direct effects of Judge Field’s work on the state bench, various and important as it was, have, of course, been confined to the state of California; and it is little to say that he contributed more than any other of the judges to settle the jurisprudence of that state upon a broad and scientific basis of justice and equity. The *indirect* effects of his work have extended throughout the whole country, in two distinct forms: *First*. Many particular conclusions arrived at by the Court under his guidance, and embodied in positive rules for the state of California, and afterwards, perhaps, incorporated into its statutory legislation, have been intentionally borrowed by the courts and legislatures of other commonwealths; and thus, while directly constructing the law for one state, he actually performed the same labor for other states of the Union. *Secondly*. The general doctrines which he as a judge, or the court under his lead, discussed, expounded, and declared in judicial opinions, have exerted a most powerful influence in aiding the decisions of other tribunals and in shaping the development of legal and equi-

table principles in other parts of the United States.

"California was utterly unlike any of the other states at their early settlement. From the heterogeneous mass of immigrants, every variety of legal notions, habits, customs, and national systems was represented among the population. The common law was not accepted as a whole, and how far its principles should prevail as the foundation of the state jurisprudence was not determined. The civil law, modified and adulterated by passing through the Spanish-Mexican codes, was acknowledged as furnishing the rules controlling many of the older land titles. The California judge was obliged to perform his work with little help from his previous knowledge of the law in the settlement of these and similar questions—questions entirely different from those which had been presented to other courts, American or English. He was required to frame a state jurisprudence *de novo*—to create a system out of what was at the time a mere chaos. Three distinct matters furnished the material for the most important as well as violent controversies, involving legal questions of the utmost difficulty and magnitude, affecting pecuniary interests to an incalculable amount, and provoking most bitter animosities among the opposing parties—which animosities were often directed against the judges when the unjust and illegal claims of individuals or communities were defeated. These matters were: 1st. The immense extent and indefinite boundaries of the Mexican land grants.

2d. The occupation by settlers of the public lands belonging to the United States, before the government had taken any steps to provide regulations for their use and sale. 3d. The mineral resources, the mining and water rights, and the claim of California to own the gold and silver found in any lands situated within the state.

“Added to this unprecedented condition of the law was the equally unprecedented condition of all business relations subsisting between individuals, which cannot be better portrayed than by quoting the language of an associate with Judge Field upon the Supreme Court Bench of the state :

When, in addition, it is considered that an unexampled number of contracts, and an amount of business without parallel, had been made and done in hot haste, with the utmost carelessness; that legislation was accomplished in the same way, and presented the crudest and most incongruous materials for judicial construction; and that the whole scheme and organization of the government, and the relation of the departments to each other, had to be adjusted by judicial interpretation,—it may well be conceived what task even the ablest jurist would take upon himself when he assumed this office.

“On the whole, the California judges were confronted by a task enormous in its difficulty and importance; wholly unprecedented in the legal and judicial history of the country; with little aid from the doctrines of jurisprudence prevailing in other states; and requiring to be grappled with, adjusted, and settled without delay, upon a just and solid basis. Their difficulties were still further aug-

mented by the character and dispositions of a large portion of the population. As was inevitable, the absence of legal and social restraints had induced great numbers of persons to engage in the most extensive schemes of fraudulent acquisition, of grasping and accumulating property through an open disregard of others' rights, of asserting the most unscrupulous and unfounded claims, of over-riding law, order, equity, and justice in every possible manner, having the semblance of legal sanction. These persons were often influential, and could control the newspapers and other organs of temporary popular opinion. When their projects were thwarted by judicial decisions, they attempted to coerce the Court by public attacks of the most bitter nature upon individual judges, attacks such as have never been known, and would never for a moment be tolerated in the eastern states, but which the Court was powerless either to prevent or to punish. The most able and upright members of the court were made the objects of virulent abuse, the extent and fierceness of which we can hardly realize at the present day. It is true, that in the course of time, the truth gradually asserted its power, the public mind appreciated the justice and integrity of the decisions, perceived their wisdom, and acknowledged their beneficial results. Notwithstanding this complete change in the popular opinion, as late as 1881, the old abuse was occasionally revived; individuals whose schemes were defeated still pursued the court with their hos-

tile criticisms. As Judge Field stood preëminent among his associates in the fearless discharge of duty, so he was the especial object of these persistent libels.

"Such being the problem presented to the California Supreme Court, it should be added, in forming a just estimate of Judge Field's work, that up to the time when he was placed upon the bench, much less had been done towards its permanent solution than the public had a right to expect. The Court had not always, whether justly or unjustly, hitherto commanded that entire confidence and respect of the public which are essential for any tribunal, if its judgments are to have moral weight in a community by settling disputed questions and putting controversies at rest."¹⁴

"A great change followed the accession to the bench of Judge Field and his associates, Judges Baldwin¹⁵ and Cope, and great results followed their adminis-

¹⁴ It suffered from some of its members. Judge Field writing to Professor Pomeroy, June 21st, 1881, says: "The living members of the old court are Judge Hastings, the founder of your Law Department,—Judge Hydenfelt, Judge Bennett, Judge Burnett, and Judge Terry. No one ever questioned the integrity or ability of Hydenfelt and Bennett, or the integrity of Burnett or Terry. Hastings you know, and he was never regarded as a shining light. Terry had ability, but his southern prejudices and partisanship affected his judgment. The judges who brought the greatest reproach upon the bench were Wells, Murray and Anderson, all of whom are dead." Of Terry, destined to be connected with the most tragic episode of his life, he says in 1877 (*Early Days*, p. 124): "Mr. Terry had the virtues and prejudices of men of the extreme South in those days."

¹⁵ Joseph C. Baldwin, who died in 1864, was a profound lawyer and judge. He shares, next to Judge Field, the reputation won by his court during this period. He was also a humorous writer of some

tration of justice. While Judge Field shared the bench with his able, learned, and worthy associates, it is admitted by all who were personally acquainted, as contemporaries and participants, with the judicial history of the state, and a truth patent to all who have obtained their only knowledge from the reports of decisions during his term of office, that he assumed and maintained the position of leadership among his brethren. In the fundamental principles adopted by the Court, in the doctrines which it announced, in the whole system which it constructed for the adjustment of the great questions hereinbefore described, his controlling influence was apparent; his creative force impressed itself upon his associates, guided their decisions, shaped and determined their work. The preëminence which he thus attained was universally recognized. He seems in a most remarkable manner to have always been identified with the Court itself of which he was a member.

“On March 3d, 1863, an act of Congress was approved by the President providing for an additional justice of the Supreme Court, and making the states on the Pacific Coast a new circuit. On the recommendation of the entire delegation in Congress from those states consisting of four senators and four representatives,—of whom five were Democrats and

note, the author of “*The Flush Times of Alabama and Mississippi*” (1853), an extract from which is given in the Stedman-Hutchinson Library of American Literature, vol. VI, 492.—Ed.

three Republicans, and all Union men,—Judge Field,—himself a Democrat—was nominated by President Lincoln, and his nomination was unanimously confirmed by the Senate. He resigned the state judgeship, and took the oath of office as Judge of the United States Supreme Court on the 20th of May, 1863.”

In 1859 Judge Field married, at San Francisco, Miss S. V. Swearingen,¹⁶ of an old New York family of Dutch descent. No children were born of this marriage. In 1866 he received from his *alma mater*, Williams, the degree of Doctor of Laws. In 1876–77 he served on the Electoral Commission, voting with the Democratic minority. In 1880, and again in 1884, he was quite prominently spoken of as a possible candidate for the Presidential nomination; but, largely as a result of the unpopularity of the decision in the Chinese Queue Case,¹⁷ failed to obtain the support of the California politicians.

On January 13th, 1866, he received through the mails, from San Francisco, an infernal machine or torpedo so constructed that the raising of the lid would explode a dozen cartridges. Fortunately, before he had proceeded far enough to explode the cartridges a friend was able to guess the contents. On the inside of the lid was pasted a newspaper cutting referring to his decision in the Pueblo Land

¹⁶ Born Louisville, Ky.; died at Oakland, California, 1901, about two years after Judge Field's death.

¹⁷ Ah Kow vs. Nunan, 5 Sawyer's Reports, 552 (1879).

Case.¹⁸ No clue to the sender was discovered by the detectives of the Federal Government or the San Francisco police.

Some of his judgments that are now most highly esteemed evoked at the time a degree of partisan or personal bitterness even more violent than that which had attended certain of his decisions as a state judge. His opinion in the Test Oath Cases¹⁹ was assailed by the Republican press, and by an overwhelming majority of the House of Representatives, with a bitterness which, at the present day, seems incredible. The virulence of party feeling and the absence of cool judgment at this great crisis in the nation's history are well illustrated by an absurd incident which occurred in January, 1868. At that time the famous *McArdle* case, involving the validity of the Reconstruction Acts, was before the Supreme Court. Judge Field, one evening, had been attending a large private dinner given to men prominent in public life. Leaving early, his place was taken by R. M. Price, ex-Governor of New Jersey. This gentleman, later in the evening, entertained the guests with a speech in which he predicted the speedy "smashing" of the Reconstruction Acts at the hands of the Supreme Court. An enterprising reporter who had dropped in at this point, scenting news, was told by a negro waiter that the speaker was none other than

¹⁸ This decision settled the basis of land titles in San Francisco, and was a grievous disappointment to a horde of hungry speculators.

¹⁹ 4 Wallace's Reports, 277, 333 (1866).

Justice Field; and as Justice Field's the speech was reported in a Washington paper the following day. On the sole strength of this newspaper report, a resolution of inquiry, with a view to the impeachment of Judge Field, was introduced in the House by unanimous consent and passed by a large majority. The journalistic sensation may be imagined from the fact that the conservative New York Evening Post received the story, so absurd upon its face, with the utmost gravity and concern.

Towards the close of his life he was called upon in the discharge of his judicial duties, to exhibit, before the eyes of the world, that personal courage in the face of murderous attack which had so frequently won the respect of the friends of his younger manhood.

The litigation which gave rise to the Terry-Neagle affair constitutes, with its offshoots and consequences, perhaps the most sensational *cause célèbre* in our legal annals. The story begins in September, 1883, with a conspiracy concocted against the huge fortune of William Sharon, a social and financial magnate of San Francisco, and at that time Senator from Nevada, by his discarded mistress, Sarah Althea Hill, with whom he had broken about two years before; a disreputable attorney; and a notorious negro procuress, a friend of the Hill woman. The weapon determined upon was a so-called written contract of marriage, purporting to have been made in 1880, to which Mr. Sharon's signature

was forged. Mr. Sharon promptly began suit for the cancellation of this forgery, in the United States Circuit Court; Miss Hill followed with a suit in the state court to establish the marriage, and for a divorce. Presently she added to her legal forces David S. Terry, who had been Chief-Justice of the state when Judge Field ascended the bench—a lawyer of some ability, a Texan, a man of a giant's size and strength, a "dead shot," known the country over in 1857 as the murderer of Senator Broderick in a famous duel. The suit in the state court was successful; the decree of divorce was entered in February, 1885. The protracted trial in the United States Circuit Court which soon followed was marked by constant violent and disorderly conduct on Miss Hill's part, requiring an order by Justice Field that she be disarmed of the pistol which she had threateningly exhibited. At the end of 1885 a decision was made pronouncing the alleged marriage contract a forgery. Since Sharon had died some weeks before, the decree was entered *nunc pro tunc* as of the day prior to his decease.²⁰ Judge Field had returned to Washington, and of course, took no part in this decision. Soon thereafter Terry married Miss Hill—a well-matched pair in disposition and in reckless determination. Here matters rested for about two years, when, in January, 1888, the state Supreme Court, by a bare majority, affirmed the decree of divorce. Shortly afterwards the Sharon

²⁰ 26 Federal Reporter, 337 (1885).

executors filed a bill of revivor of the cancellation decree, which had never been enforced. This bill was argued before Judges Field, Sawyer and Sabin.

While the bill of revivor was under advisement, attention was again focussed on the case by a public assault committed by Mrs. Terry upon Judge Sawyer, evidently designed to provoke an affray. The decision in favor of the bill was rendered on September 3d, 1888.²¹ When the portion of the opinion was reached, alluding to the cancellation decree, Mrs. Terry, who had been acting in a very excited manner, sprang to her feet and interrupted the presiding justice with the question, "Are you going to make me give up my marriage contract?" Justice Field said: "Be seated, Madam." She repeated the question and was again ordered to be seated. She then launched into a violent and coarse tirade, accusing Judge Field of having been paid for his decision. He promptly ordered the marshal to remove her from the court room. Terry now rose from his seat, dealt the marshal a blow so violent as to knock out a tooth, and was apparently in the act of drawing the bowie knife with which he was known to be always armed, when he was seized by four spectators and held fast on the floor. Mrs. Terry was carried to the marshal's office "struggling, screaming, kicking and scratching as she went." Terry was allowed to rise and follow her. As he left the room, he drew and brandished his knife;

²¹ 36 Federal Reporter, 337, 345-369 (1888).

amid shrieks of alarm and the wildest confusion he was again seized, and after a desperate struggle, in which Neagle, a deputy marshal, was the chief actor, he was disarmed. Judge Field then proceeded with the reading of the long opinion; after it was finished the three judges, on consultation, sentenced Terry to six months' imprisonment for contempt, and Mrs. Terry to one month. This judgment and the judgment in the revivor suit were affirmed by the Supreme Court.²²

During the term of Terry's imprisonment, and the months following, both he and Mrs. Terry made frequent, open threats against Judge Field's life, should the latter venture to return to California in the summer of 1889;²³ many of these were published in the newspapers; indeed, current gossip in California was concerned not so much with the question whether they would murder the Justice,—that was conceded,—as with the question of when and how. To the urging of his family and friends that he should not return that summer, Judge Field paid no attention; to their repeated requests that he should at least arm himself against the certain encounter, he made the memorable reply, which, a few months later, rang through the press of the country, "When the judges shall be obliged to go armed, it is time for the courts to be closed." His danger was so obvious that, as

²² *Ex parte Terry*, 128 United States Reports, 289 (1888); *Terry vs. Sharon*, 131 United States Reports, 40 (1889).

²³ See some particulars in 135 United States Reports, 46, 47 (1889).

a result of a correspondence between the Attorney-General of the United States, the District-Attorney, and the Marshal, Mr. Neagle, deputy-marshal, was detailed to accompany Judge Field both in court and while traveling from one court of his circuit to another. This arrangement met with a strenuous protest on the Judge's part.

In July, 1899, the vindictiveness of the Terrys was rendered more desperate by a decision of the State Supreme Court, disregarding their former judgment and ordering a new trial of the divorce suit.²⁴ On the night of August 13th, at Fresno, they boarded the train on which Judge Field, accompanied by Neagle, was returning to San Francisco from Los Angeles, where he had been holding court. The train stopped for breakfast at Lathrop. When the train arrived, Neagle informed Judge Field of the presence of Terry on the train, and advised him to remain and take his breakfast in the car. This the Judge refused to do, and he and Neagle got out of the car and went into the dining-room, and took seats beside each other in the place assigned them. Very shortly after this Terry and his wife came into the room; and Mrs. Terry, recognizing Judge Field, turned and left in great haste, while Terry passed beyond where Judge Field and Neagle were and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car, and took from it a satchel in which was a revolver. Before she re-

²⁴ Sharon vs. Sharon, 79 California Reports, 633 (1889).

turned to the eating-room, Terry arose from his seat, and, passing around the table in such a way as to bring him behind Judge Field, who did not see him or notice him, Terry came up to where the Judge was sitting with his feet under the table and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow,²⁵ when Neagle, arose from his seat with his revolver in his hand, and in a very loud voice shouted out: "Stop, Stop! I am an officer!" Upon this Terry turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him, and immediately turned his hand to thrust it in his bosom,²⁶ with the purpose, as Neagle supposed of drawing a bowie knife. At this instant Neagle fired two shots. Terry immediately sank to the floor, dying in a few minutes.²⁷

The youthful district-attorney of the county in which Lathrop was situated, on the unsupported testimony of Mrs. Terry, who had not seen the shooting,

²⁵ Judge Field was partially stunned by the first blow. It should be remembered that Terry was a person of gigantic size and strength, and that Judge Field was a cripple and in his seventy-third year.

²⁶ The movement was noticed by another witness. However, when the body was at last searched, no knife was found. Its absence is easily explained by the fact that Mrs. Terry, who returned to the dining room after the shooting, and was allowed entire freedom of movement by the spectators at the time and afterwards, save that she was not permitted to enter Judge Field's car,—spent fully a minute prostrate upon the body and had abundant opportunity to abstract the knife and dispose of it at her convenience.

²⁷ 135 United States Reports, 4, note (1889).

issued a warrant for the arrest, not only of Neagle, but of Judge Field. The warrant was served upon Judge Field in San Francisco; but it was not until after a delay of nearly two weeks—during which *habeas corpus* proceedings were pending in the United States Circuit Court—that the higher State authorities of California finally awoke to the fact that the astonished eyes of the world were centered upon her. In obedience to the request of the Governor to avert the “burning disgrace” of this “unwarranted proceeding,” the attorney-general of the state ordered the dismissal of the charge against Judge Field. Neagle was released on *habeas corpus* on the ground that he was executing the laws of the United States, though no statute specified the particular duty which he had been performing. The judgment of the Supreme Court in affirmance and the opinion of Mr. Justice Miller, form one of the great landmarks of recent constitutional interpretation.²⁸

In April, 1897, Mr. Justice Field transmitted his resignation to President McKinley to take effect on December 1st, 1897. This was accepted by the President on October 9th, in a characteristic letter, full of words of appreciation. Three days later Judge Field addressed to his associates of the bench a farewell letter, reviewing the work and influence of the Supreme Court during the long period of his membership—a remarkable document, whose quiet elo-

²⁸ *In re* Neagle, 39 Federal Reporter, 833 (1889); 5 L. R. A., 78 (1889). Affirmed, 135 United States Reports, 1 (1890).

quence and mellow wisdom showed no sign of waning powers. To this his brethren made a reply, brief, but touching in its evidence of sincere affection and regret.²⁹ At the time of his resignation he had served upon the Supreme Bench for a period of 34 years and 7 months, a term longer than that of any member of the court since its creation.³⁰

The hope tenderly expressed by the President and the Justices that his life might be spared for many years of enjoyment of the rest so richly earned, was not to be fulfilled. At his home in Washington, on Sunday evening, April 9th, 1899, aged 82 years and 5 months, he "passed peacefully from this life—full of years and honors, and attended by all that should accompany old age."³¹

Judge Field was an indefatigable worker; the law was his whole life. His opinions were always prepared with the utmost care,—with entire absorption in his task and oblivion to his surroundings. With a strong and well-trained memory, he never made his official utterances a means for the display of useless erudition; the results of this care and concentration are manifest, rather, in that clearness, ease, and accuracy of literary style which render many of

²⁹ The correspondence will be found in 168 United States Reports, 713-718 (1897).

³⁰ Chief-Justice Marshall served 34 years and 5 months; Justice Story, 33 years and 10 months; Justice Wayne, 32 years and 6 months; Justice McLean, 32 years and 1 month; Justice Washington, 30 years and 11 months; Justice Johnson, 30 years and 5 months.

³¹ 173 United States Reports, 708 (1898).

his opinions models of legal argumentation, and in the highest degree instructive to the text writer and the student.³² He allowed himself no recreation, little or no distraction of minor intellectual interests, no vacations. During twenty-seven years, from 1863 to 1890, only twice did he fail to make the annual long journeys to the Pacific coast, although as Circuit Justice he was required to attend the sittings of the courts of his Circuit in alternate summers only. His summers, therefore, were nearly as laborious as his winters. Until the completion of the transcontinental railroad, and, years later, of the railroads connecting the various parts of his vast circuit, the amount and character of the traveling required was in itself no small hardship. The expense,—nearly equal to the combined expenses of all the other Circuit Justices,—was defrayed entirely out of his moderate salary; a statutory allowance originally made for the purpose having been discontinued in 1871 by a Republican Congress.

In appearance, Judge Field was a man of striking and impressive dignity; in manner, of gentleness and extreme refinement. A trait which was very conspicuous to the public, was the close attention with

³² As illustrating Judge Field's habits of industry, it is said that when traveling by steamer, he always took with him for use on the voyage, a trunk full of law books; as illustrating his habit of absorption when engaged upon an opinion, that at those times he could hardly be tempted to attend his family's meals. He set great store by the training of memory, both in himself and those near to him, insisting that reliance should not be placed on memoranda or other artificial aids.

which he was in the habit, when on the bench, of following the arguments of counsel, however tedious or uninforming they might be. To allow himself to be distracted from the business before the court for the purpose of attending to his correspondence or to matters of routine, was a practice wholly inconsistent with the high courtesy of his nature, and with his conception of judicial dignity.

To ordinary social duties he yielded just so much as was required by the conventions of his station,—no more and no less. His one relaxation was found in the society of the old and valued friends who sought him out; with them he was the soul of geniality; his vivid memory, his knowledge of men, his varied and adventurous experiences and his happy faculty for recounting them made him a most interesting host and companion. But his talent for friendship was not merely the expression of a warm and hospitable nature; next to his devotion to his profession, it amounted to a ruling passion. His friends seemed always in his mind; no trait in him was more noticeable than his constant seeking for ways and means, consistent with the obligations of his office, by which he might be of service to them. With his brethren on the bench his relations were always most cordial; between him and his great associate, Mr. Justice Miller, especially, with whose views he so often differed, there existed the closest personal attachment.

In connection with these genial traits of a sin-

gularly noble and lovable character, it is instructive to note that no hour of his life, for nearly twenty years, was free from keen physical suffering. A neglected injury to the knee, received at Marysville in the early fifties, permanently disabled him from any active exercise; his zeal in the performance of the last honors to a friend rendered this lameness acute and always painful.³³

"It would be a comparatively easy task for one who was personally a stranger to Judge Field, and was acquainted with him only through his reported decisions, to form a correct estimate of his judicial character. Its important elements, those which distinguished him from other judges, and which constituted the special grounds of his success and of his power, stand out in clear-cut lines upon all the creations of his official labors. He stamped himself—his intellectual and moral features—deeply into all the work which he did.

"In the first and lowest place, he possessed an ample legal learning. It cannot be pretended that he had that exact knowledge of technical common-law dogmas which distinguished such a judge as Lord Kenyon or Baron Parke, or of the intricate minutæ of real estate and conveyancing law which alone gave Lord Eldon his preëminence among English chancellors,—a sort of knowledge which with a cer-

³³ About twenty years before his death, as pall-bearer at a funeral, he was forced to tramp for some hours over the cobble-stone pavements of San Francisco. Judge Field very rarely alluded to his lameness, even to his family and intimate friends.

tain pedantic school has passed for the highest legal learning, but which is worse than useless rubbish for the American judge of to-day. Judge Field's learning, as a distinctive feature of his intellect, was rather the capacity in an extraordinary degree to acquire the new knowledge made necessary by the demands of his position;—the capacity to investigate sources and systems of jurisprudence hitherto unknown, to sift truth from error, to extract whatever there is of living principle, and to appropriate and to assimilate the materials thus obtained with the state or national law which he was administering.

“The second and much more important element which I shall notice, was his devotion to principle;—that quality of intellect which led him, on all judicial occasions, to seek for, apprehend and appreciate principles, rather than to rest satisfied with *mere* rules, although sustained by precedent, and to apply firmly these principles, when found, in all their relations and consequences;—to place his decisions upon the solid basis of fundamental and universal principles, rather than upon arbitrary dogmas. This quality gives a most marked unity, consistency, and universality to his decisions, not only to those connected with some single branch of the law, but to those belonging to any and all departments. His adjudications generally will thus be found related to each other, harmonious, corresponding parts of one completed system.

“The third distinctive element requiring special

notice is what may appropriately be called his *creative power*. By this designation I mean his ability in developing, enlarging, and improving the law, by additions of new material, whether this material be borrowed from foreign sources or is created by means of the legislative function belonging to all Superior Courts. The intellectual attributes referred to in this and in the preceding head are entirely distinct; they may coexist in the same individual, or the first may be possessed in a high degree without the other. The first deals with the jurisprudence as it has already been established, investigating, examining and expounding or applying its settled principles and doctrines; the other is creative and legislative, employed in constructing new law, or reforming and expanding that which already exists. Many judges of great and well-deserved reputation have possessed the first quality to a remarkable extent without any of the second—of which class, I think, Judge Story was an example. Judge Field's peculiar talent as a legal reformer was shown in his purely legislative work done while a member of the State Assembly. He exhibited the same power and tendency upon the bench. They were shown in his constant rejection of ancient common-law dogmas, no matter how firmly settled upon authority, which had become outgrown, obsolete, and unfitted for the present condition of society, and in the substitution of more just, consistent, and practical doctrines adapted to the needs of our own country and people.

"The fourth element of his judicial character was his fearlessness. As the power to apprehend and apply principles is the highest *intellectual* quality, so is a true fearlessness the highest *moral* attribute of the ideal judge.

"From the very commencement of his career on the state bench, and through all the following years, opportunities were frequently presented to him, in the regular discharge of his official functions, by which, without any plain surrender of right, any obvious transgression of duty, by the mere adoption of a different line of argument leading to a different conclusion,—and even sometimes when that line of argument and that conclusion were, upon a surface view, correct, and were approved by a majority of the legal profession,—opportunities, I say, by which, in this manner, he might have obtained an immediate and even an enthusiastic popularity; but in which, by following the voice of conscience and duty, and the dictates of his own matured judgment, he was certain to encounter a storm of hostile criticism, and even malignant hatred. On no occasion was he ever influenced by either of these considerations; on no occasion did he ever swerve from his duty and surrender his own conscience and enlightened judgment."

AN EXAMINATION OF JUSTICE FIELD'S WORK IN CONSTITUTIONAL LAW.

BY

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Justices Miller, Bradley and Field are usually associated in the mind of one contemplating the history of the Supreme Court, partly because they were contemporaries, and partly because they stood out prominently as the "strong" members of the Court during the period of their activities therein. No three men ever were more different, however, in temperament, equipment and views. Field's influence was probably not so profound as that of Miller. He was a greater lawyer, but it may be doubted whether he was as wise a statesman. Miller was more practical, and he was also, from the standpoint of politics, more consistent in his opinions. Field apparently had no conceptions to guide him in his political decisions so fixed that they would not usually succumb to the law of the particular case before him. It is also to be remembered that the tendencies of the court leaned more to the constitutional interpretations of Miller than to those of Field. The latter's greatest opinions were dissents and not expressions of the judgment of the Court; his powers

were critical rather than constructive. He acted principally as a curb or check upon the centralizing tendencies of his associates, being the most powerful advocate in the Court of the doctrine of state, that is of local, government as far as was consistent with national strength. Whether or not these general observations are accurate will be seen upon a more detailed study of his views as they appear in his Supreme Court decisions.

The most marked influence of Field on the bench of the Supreme Court was in his resistance to the impulse engendered by the war to make of the Central Government an all-powerful agency, controlling not only broad questions of national policy but also the ordinary civil rights of the citizens of the states. Although not upholding his principles of antagonism to such a tendency in every case—as witness, for example, the Slaughter-House Cases,¹—yet the main current of his views was undoubtedly in the direction indicated. His interpretation of the Constitution was that of the Democratic party; he was a “strict” constructionist, and he opposed the vesting in Congress of any power which was not placed there by the Constitution either in express language or by necessary implication.

This position is most clearly evidenced by the Legal Tender Cases,² although the dividing line be-

¹ 16 Wallace's Reports, 36 (1872).

² Knox vs. Lee, 12 Wallace's Reports, 457 (1870); Julliard vs. Greenman, 110 United States Reports, 421 (1883).

tween the justices in those cases was not so much that between "broad" and "strict" constructionists, as it was between those justices who were willing to ignore the most established rules of constitutional interpretation in order to accomplish a desired national end and those who were not ready to sacrifice law for policy. In *Juilliard vs. Greenman* Justice Field says:

Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government. There is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers, supreme within its prescribed sphere, but powerless outside of it. In this country sovereignty resides in the people, and Congress can exercise no power which they have not, by their Constitution, entrusted to it; all else is withheld.

Not only does Field thus state his views as to the powers of Congress, but he exemplifies them by the manner in which he proceeds to demonstrate that the Legal Tender Act was unconstitutional. His method of reasoning is to analyze each pretended source of the power of Congress to declare its treasury notes legal tender,—for example, the power to borrow money, to coin money, to declare war, etc.,—and to show that such power does not result as a necessary implication from the powers expressed in the Constitution. If, then, upon exhausting the express powers, the power in question is not discovered and is not necessarily implied as an aid to the carrying out of the powers enumerated, it clearly does not exist; there is no possibility of the existence of a

power in Congress resulting from any political doctrine of a sovereign nation, or from a consideration of the general purposes of the National Government. The mere fact that other governments have such power is not significant, because ours is a government of delegated powers; the people, who are the ultimate sovereigns, have not seen fit to vest in it the same full powers which some other governments possess. Neither is it of determining importance that the power in question is denied to the states, because a power may be expressly forbidden to the state governments without thereby or otherwise being granted to the Federal Government. Such is the reasoning of Field's dissenting opinions in the *Legal Tender Cases*, and such was his usual attitude upon questions of a similar kind. This method of interpretation consists in demanding some specific clause of the Constitution as the source of the power claimed; a power is not to be sought as existing by reason of some vague conception of the general nature of the government established by the Constitution or of a "spirit" of the Constitution apart from its individual clauses.

It has already been stated that Field sacrificed politics to law, and was not as consistent as was Miller in determining cases according to his political views. But it is not true that Field invariably applied to the case before him the principles of constitutional interpretation which he had established for his own guidance. It was Field who wrote the opinion of

the Court in *The Chinese Exclusion Cases*,³ and certainly that case is authority for the proposition that in their relations at least with foreign countries and persons the United States are a nation "invested with powers which belong to independent nations," and that Congress has, as an incident of sovereignty, the power to exclude aliens from the United States, although no such power is expressly or impliedly given by the Constitution itself. With the decision reached in the Chinese Exclusion Case no intelligent student of politics can find fault, for as Field himself says in the opinion: "If it [the Government of the United States] could not exclude aliens it would be to that extent subject to the control of another power." But with the wisdom of the decision as an act of statesmanship we have nothing to do. The question is whether the conclusion is reached by the methods of constitutional interpretation which Field was wont to use and professed invariably to employ. It was characteristic of Miller to determine the end to be reached and later to discover the method of reasoning by which to attain that end. But with Field we look for the application of strictly logical and consistent principles to the construction of the Constitution even though the result arrived at was in Field's own judgment an undesirable one. If the Constitution is to be construed, as Field contended, as an instrument by which powers were granted to the Federal Govern-

³ 130 United States Reports, 581 (1889).

ment only by express words or by necessary implication from an express grant, and all powers not so given were retained by the sovereign people, then all mistakes made in that instrument by the neglect to have foreseen the necessity of granting certain important powers should be corrected, not by a new method of interpretation, but by a frank avowal of the unfortunate limitations placed upon the federal power and an appeal to the constitutional method of amending that instrument. The truth is that Field was as eager a patriot as his associates on the Supreme Court bench, and when the temptation came to obtain admittedly desired ends by the sacrifice of a theoretical consistency Field proved that no jurist can stifle the instincts of statecraft. With the Legal Tender Cases it was different, because there the practical wisdom of Congress possessing the particular power involved was as much in dispute as the legal question whether the Constitution gave such power to Congress. It is therefore perhaps not unfair to say that sometimes Field's methods of constitutional interpretation shaped themselves to his conception in the given case of the end to be attained, although clearly not with as much frequency as in the case of Miller.

The most interesting subject of examination with respect to Field's views of the nature of our federal system is his position with reference to the relation and relative powers of the state and the National Governments. The popular estimate of Field as of

a believer in state sovereignty is wholly inaccurate, and is to be traced no doubt to the general prejudice which prevailed against Democrats in office during the days of the Civil War and the period succeeding it. Field was in fact a nationalist and believed unalterably in the supremacy of the Union. The doctrine of "states' rights," in its popular sense, was repugnant to him, and the idea of secession and consequent disintegration detestable. On the other hand his constant fear was of a supposed dangerous tendency of the courts to the evolution of a strongly centralized government, and while he did not believe in state sovereignty he did believe in the importance of having the local governments unhampered in their administration of purely local affairs. In *Pensacola Telegraph Company vs. Western Union Telegraph Company*,⁴ he says:

The late war was carried on at an enormous cost of life and property, that the Union might be preserved; but, unless the independence of the states within their proper spheres be also preserved, the Union is valueless. In our form of government, the one is as essential as the other; and a blow at one strikes both. The general government was formed for national purposes, principally that we might have within ourselves uniformity of commercial regulations, a common currency, one postal system, and that the citizens of the several states might have in each equality of right and privilege, and that in our foreign relations we might present ourselves as one nation. But the protection and enforcement of private rights of both persons and property, and the regulation of domestic affairs, were left chiefly with the states; and, unless they

⁴96 United States Reports, 1 (1877).

are allowed to remain there, it will be impossible for a country of such vast dimensions as ours—with every variety of soil and climate, creating different pursuits and conflicting interests in different sections—to be kept together in peace. As long as the general Government confines itself to its great but limited sphere, and the states are left to control their domestic affairs and business, there can be no ground for public unrest and disturbance. Disquiet can arise only from the exercise of ungranted powers.

And again in *Tarble's Case* he says: ⁵

The two governments (Federal and State) in each state stand in their respective spheres of action in the same independent relation with each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. . . . Whenever, therefore, any conflict arises between the enactments of the two sovereignties or in the enforcement of their asserted authorities, those of the national government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States.

Thus we see that Field had a clear-cut conception of our federal system,—a National Government supreme in the subjects of jurisdiction and power confided to it by the Constitution, state governments supreme in the matters over which power was reserved to them by the people, the Federal Government carefully to avoid attempted usurpation of state powers, but to prevail in all cases in which it has concurrent rights with the local governments and a conflict of enactments occurs. So far from such views being

⁵ 13 Wallace's Reports, 397 (1871).

heretical or anti-national they represent admittedly the proper and wise interpretation of the division of powers established by the Constitution,—to be departed from on the one side only at the risk of national weakness and disunion, and on the other at the peril of a bureaucratic, rigid, consolidated central government under which real freedom and local autonomy would ultimately be destroyed.

Not only was Field a "Union" man above all possible suspicion or doubt as to his loyalty, but he was heartily in sympathy with the policy of aggressiveness adopted by the North in suppressing the Rebellion. His decisions refuse to recognize the Confederacy even as a *de facto* government,⁶ or to concede to it any political powers or rights whatsoever. It is true that he concurred in the view of the Supreme Court which admitted that the Confederacy had a sufficiently imposing military organization to justify the Government in conceding to it the ordinary rights of a belligerent, and he also believed, and of course properly, that the acts of the various state governments of the South during the war were valid in so far as they concerned the ordinary matters of civil life and lent no aid to the Rebellion. But the doctrines of the right of secession and state sovereignty which the leaders of the Confederacy upheld were abhorrent to him, and he was as strong a supporter of the Northern policies during the war as were the

⁶ See, for instance, *Williams vs. Bruffy*, 96 United States Reports, 176 (1877).

Republicans, with the exception only of a few ultra-radicals.

It was when the war was over and the dangers of disintegration had passed away that Field gradually became one of the champions of the movement which opposed the reaction toward a consolidation of the Government. With Miller he realized that there was sure to be a tendency toward a concentration of powers in the Central Government and a consequent weakening, degradation, and perhaps ultimate annihilation of the states. With the exception of Miller's decision in the Slaughter-House Cases, it is Field's decisions and dissents which were most important in preserving the originally intended equilibrium between the states and the Nation. His ideas are best illustrated in his series of dissenting opinions found in the one hundredth volume of the United States Reports,⁷ protesting against the alleged rights of Congress to supervise the manner in which state officers executed state laws, and to provide for the removal, before trial, from state to federal courts, of suits brought against federal officers because of the method of performance of their official acts. To allow such rights to Congress he believed would be "dangerous to the independence of

⁷ *Tennessee vs. Davis*, 100 United States Reports, 257 (1879); *Strauder vs. West Virginia*, *ibid.*, 303; *Virginia vs. Rivers*, *ibid.*, 313; *Ex parte Virginia*, *ibid.*, 339; *Ex parte Siebold*, *ibid.*, 371; *Ex parte Clark*, *ibid.*, 399. See also *Neal vs. Delaware*, 103 United States Reports, 370 (1880); *Brush vs. Kentucky*, 110 United States Reports, 110 (1882).

the States, and so calculated to humiliate and degrade them." In *Ex parte Virginia*, he says:

Nothing, in my judgment, could have a greater tendency to destroy the independence and autonomy of the states, reduce them to a humiliating and degrading dependence upon the central government, engender constant irritation, and destroy that domestic tranquillity which it was one of the objects of the Constitution to insure, than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the states in the discharge of their duties under state laws.

But although Field thus constantly held before his eye, as a possibility to be vigorously shunned, the vision of a highly centralized government, he was never so much a slave to the morbid fear of such a result, that he did not as enthusiastically uphold the supremacy of the nation. He did not tolerate any doctrine by which a state could be allowed to cripple the Federal Government in the exercise of the great powers given it by the Constitution. In *Tarble's Case*, we find him expressing the opinion of the Court in a decision which holds that a state judge has no jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under such a writ when issued, for the discharge of a person held under the authority, or color and claim of the authority, of the United States by an officer of that Government. And in *Railroad Company vs. Peniston*,⁸ he concurs in the dissenting opinion of Mr. Justice Bradley maintaining that a state has no power to tax in any

⁸ 18 Wallace's Reports, 5 (1873).

way an agency of the Federal Government—in the particular case the Union Pacific Railroad Company—created by it to carry out a national object. Nor was Justice Field so much imbued with the idea of the dignity of state government that he concurred with the decision of the Supreme Court in those cases in which, because of the restrictions imposed by the eleventh amendment, the states were allowed to repudiate with impunity their indebtedness.⁹ His idea of state independence was never pushed to the extreme that would blindly countenance any and every action on the part of a state, on a theory either that it could do no wrong, or, if it did, that it could not be held accountable for it.

The most unexpected opinion of Field was that rendered in the case which contained also the most unforeseen opinion of Miller, namely, the Slaughter-House Cases. It seems almost incredible that Miller, strong Republican partisan as he had been, should have decided that the fourteenth amendment, so far as it purported to prohibit the states from abridging or impairing the privileges of United States citizenship, really added nothing to the Constitution; but it seems even more wonderful that Field, whose constant fear was the danger of centralization of power as a result of the war, and a consequent degradation of the states, should have dis-

⁹ *Louisiana vs. Jumel*, 107 United States Reports, 711 (1883); *Cunningham vs. Macon & Brunswick Railroad Company*, 109 United States Reports, 446 (1883); *In re Ayers*, 123 United States Reports, 443 (1887).

sented from the decision of the court in that important case, and sought to establish the doctrine that the phrase "privileges and immunities of citizens of the United States" included all those "which of right belong to the citizens of all free governments." That this was no mere hasty and erratic opinion of Field is shown by the fact that he persisted in the views expressed therein in all the later cases which involved the point, holding, for example, in his dissenting opinion in *Walker vs. Sauvinet*,¹⁰ that the right to a trial by jury in suits at common-law pending in the state courts is a privilege of national citizenship which the states are forbidden by the fourteenth amendment to abridge.¹¹ His position was that the fourteenth amendment "recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship depend upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any state or the condition of their ancestry. A citizen of a state is now only a citizen of the United States residing in that state. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen now belong to

¹⁰ 92 United States Reports, 90 (1875).

¹¹ And although he concurs in the opinion of the Court in *Bradwell vs. State*, 16 Wallace's Reports, 130 (1872); *Bartemeyer vs. Iowa*, 18 Wallace's Reports, 129 (1873); *Butchers' Union vs. Crescent City Company*, 111 United States Reports, 746 (1883), he does so only on grounds which do not conflict with his views in the *Slaughter-House Cases*, but, on the contrary, distinctly recognize and reaffirm them.

him as a citizen of the United States, and are not dependent upon his citizenship of any state." If Field's views had been adopted by the court, what would have been the result? If all the ordinary rights and liberties of a person are his privileges as a citizen not of the state where he resides but of the United States,—such rights, for example, as the right to acquire property, to pursue a given vocation, to go and come at pleasure, to enforce rights in the courts, to make contracts, to inherit and dispose of property—all these matters would have come under the legislative power of Congress and the jurisdiction of the federal courts; and the federal judiciary would have obtained a vast appellate power over the subjects of jurisdiction in the state courts. The states themselves would rapidly have sunk to the status of mere political subdivisions or satrapies. Thus Field was promulgating a doctrine the necessary results of which were most distasteful to him. The explanation seems to be that Field was here, as in so many cases, sacrificing his ideas of political policy to his duty as a constitutional jurist. There is no doubt whatever that under the decision of the majority of the court in the Slaughter-House Cases the fourteenth amendment, so far as the phrase under discussion is concerned, added nothing whatever to the Constitution. Mr. Justice Miller, in the opinion of the court expressed by him in *Crandall vs. State of Nevada*, had decided only five years before that, as far as the privileges of United States

citizenship as subsequently enumerated in the Slaughter-House Cases were concerned, the states could not abridge, or in any manner interfere with them, even without the inhibition of any fourteenth amendment at all. There is also no doubt that the framers of this amendment had intended to secure by it the broad results which, as construed by Field, it did secure, and to place all the ordinary civil rights of citizens under the protection of the Federal Government. Whether, under its wording, it could have been held to have accomplished its purpose may give rise to doubt, but Field conscientiously pursued his duty of interpreting it according to his judicial convictions even though, had he been on the floor of Congress, he would probably have been the most earnest of the antagonists of any measure which struck at the vital independence of the individual commonwealths of the Union.

A very large number of the opinions of the Supreme Court construing the fourteenth amendment were written by Field, although none of his decisions on this subject are of unusual importance. There are, however, two early opinions of his rendered in the Circuit Court for the District of California bearing on this clause of the fourteenth amendment which are specially worthy of attention. In 1872 the Legislature of California had adopted a new code, one of the provisions of which required the Commissioner of Immigration to satisfy himself whether or not any person arriving in the state

by vessels from any foreign port or place was lunatic, or crippled, or likely to become a public charge, or criminal, or a lewd woman, etc., and provided that such person should not be permitted to land in the state unless the master of the vessel gave a bond to the state to indemnify the authorities against expense which might be incurred in caring for such person. This legislation, although expressed in general language, was in reality aimed against the Chinese. A Chinese woman, being refused admittance to the state on the ground that she was in one of the proscribed classes, applied to the Circuit Court for relief, and Field wrote the opinion of that Court.¹² He recognizes from the outset that the legislation was, in fact, intended to be used as a weapon against the Chinese immigrants, and says:

I am aware of the very general feeling prevailing in this state against the Chinese, and in opposition to the extension of any encouragement to their immigration hither. It is felt that the dissimilarity in physical characteristics, in language, in manners, religion and habits, will always prevent any possible assimilation of them with our people. Admitting that there is ground for this feeling, it does not justify any legislation for their exclusion, which might not be adopted against the inhabitants of the most favored nations of the Caucasian race, and of Christian faith. . . . The state cannot exclude them arbitrarily, nor accomplish the same end by attributing to them a possible violation of its municipal laws.

And after deciding in favor of the petitioner on the ground that the subject was within the jurisdic-

¹² *In re Ah Fong*, 3 Sawyer's Reports, 144 (1874).

tion of Congress, he adds that the case was equally conclusive in her favor by reason of certain legislation of Congress based upon the fourteenth amendment, speaking of the latter in the following terms:

That amendment in its first section designates who are citizens of the United States, and then declares that no state shall make or enforce any law which abridges their privileges and immunities. It also enacts that no state shall deprive *any person* (dropping the distinctive designation of citizens) of life, liberty, or property without due process of law; nor deny to *any person* the equal protection of the laws. The great fundamental rights of all citizens are thus secured against any state deprivation, and all persons, whether native or foreign, high or low, are, whilst within the jurisdiction of the United States, entitled to the equal protection of the laws. Discriminating and partial legislation, favoring particular persons, or against particular persons of the same class, is now prohibited. Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. And equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption, with others of the same class, from all charges and burdens of every kind.

These views of Field were sustained by the Supreme Court in its decision, per Mr. Justice Miller, in the case of *Chy Lung vs. Freeman*,¹³ which construed this legislation of California just as Field had construed it. He expressed the same doctrines in the case of *Ah Kow vs. Nunan*.¹⁴ There the question was as to the validity of an ordinance of the City of San Francisco providing that every male

¹³ 92 United States Reports, 275 (1875).

¹⁴ 5 Sawyer's Reports, 552 (1879).

person imprisoned in the county jail should, immediately upon his arrival at the jail, have the hair of his head cut to a uniform length of one inch from the scalp. The jails were then being filled with Chinamen accused of violating a state statute against the overcrowding of lodging houses, and of course the ordinance was intended to act as a cruel punishment upon them, since Chinamen consider it a great and humiliating calamity to be deprived of their queues. The question involved in *Ah Kow vs. Numan* was whether the court could go back of the general language of an act or ordinance and consider the conditions of its application. Field unhesitatingly held that it not only could, but must. He said:

The class character of this legislation is none the less manifest because of the general terms in which it is expressed. . . . We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly.

He then decides that the ordinance, working, as it did, in its practical effects, a hostile discrimination against a particular race, violated the fourteenth amendment and was therefore unconstitutional.¹⁵

¹⁵ His reasoning and conclusions were affirmed years later by the

In construing that clause of the fourteenth amendment which prohibits a state from depriving any person of life, liberty or property without due process of law, Field made the same clarifying distinctions as he did with reference to the clause forbidding the denial by a state of the equal protection of the laws. A state may regulate, but not confiscate, property; it may limit, under its police power, the extent of a man's labor, but may not prohibit it, if lawful. Thus to forbid the carrying on of washing and ironing in a public laundry from 10 P. M. to 6 A. M. is a proper and valid municipal ordinance;¹⁶ and a state may require every medical practitioner therein to obtain a certificate from the State Board of Health, showing certain prescribed qualifications, before he may enter upon or continue the practice of his profession;¹⁷ but an act is unconstitutional which prohibits the manufacture of a legitimate article of commerce, because the right to pursue a lawful calling or occupation is an essential part of one's liberty.¹⁸ An act which provides for the destruction of an existing article of private property is invalid, being a deprivation of such property without due process of law, and although a state may pro-

Supreme Court in *Yick Wo vs. Hopkins*, 118 United States Reports, 356 (1885).

¹⁶ *Barbier vs. Connolly*, 113 United States Reports, 27 (1884); *Soon Hing vs. Crowley*, 113 United States Reports, 703 (1884).

¹⁷ *Dent vs. West Virginia*, 129 United States Reports, 114 (1888).

¹⁸ Dissenting opinion in *Powell vs. Pennsylvania*, 127 United States Reports, 678 (1887).

hibit the sale of intoxicating liquors manufactured therein, it may not destroy already existing liquor and the utensils for manufacturing liquor.¹⁹ These decisions contain broad statements of principle by Field which generally, although not in all their details, have been followed by the Supreme Court in later cases.

The most numerous class of cases involving questions of constitutional construction which came before the Supreme Court during Field's period on the bench, was that concerning interstate and foreign commerce. And in no branch of constitutional law does Field show more plainly that he was, at heart, a nationalist. However ardently he may have wished the states to have full governmental powers, and Congress not to have sweeping powers not delegated to it by the federal Constitution, his tendency on matters of interstate commerce was always toward the molding of a system by which Congress would be paramount and supreme where the question was one of more than local importance. No other judge who sat on the Supreme Bench of the nation, save only Bradley, was more consistent in this attitude than was Field. Indeed his dissenting opinions go to an extreme length in their denial to the states of the right to prohibit the introduction into their borders, or the exportation from their borders, of articles which were not recognized by them as legitimate subjects of commerce.

¹⁹ *Mugler vs. Kansas*, 123 United States Reports, 623 (1887).

He insisted upon the exclusive power of Congress over the instrumentalities of interstate traffic. One of his earliest and most important decisions along this line is the famous case of *The Daniel Ball*,²⁰ which placed under the control of Congress all navigable waters within the United States. This case laid down several vital principles. It established, following earlier state court decisions, that the test of navigability in this country was not, as in England, whether the tide ebbed and flowed, but whether there was navigability in fact; that rivers are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water;" that a steamer transporting, on a navigable water of the United States thus defined, goods destined for other states, is engaged in interstate commerce, and subject therefore to the legislative control of Congress; that whenever a commodity has begun to move as an article of trade from one state to another commerce in that commodity between the states has commenced; and that the fact that several different and independent agencies are employed in transporting a commodity, some acting entirely in one state, and some acting through two or more states, does not affect the character of the transaction, and to the extent to which each agency acts in such transportation it is subject

²⁰ 10 Wallace's Reports, 557 (1870).

to the regulation of Congress. It is to be doubted whether any other one decision of the Federal Supreme Court has placed so much power within the hands of Congress as did this case of *The Daniel Ball*.²¹

²¹ It would be a lengthy task to set forth all the opinions of Field in which he held unconstitutional acts of the state legislatures attempting to tax, in some form, commerce, or the instrumentalities of commerce among the states. Wherever the power was asserted Field struck at the doctrine, in many important cases voicing the opinion of his associates as well as his own, in others elaborating his individual views in strong and vigorous dissents. To mention some of those decisions is to conjure before the mind's eye the best known and most "historic" of the Supreme Court cases,—the Case of the State Tax on Railway Gross Receipts, 15 Wallace's Reports, 284 (1872), where Field concurs in Miller's dissenting opinion to the effect that the gross receipts of a railroad doing an interstate business could not be taxed by a state, a position the Supreme Court has since undoubtedly taken; the case of Railroad Company vs. Peniston, 18 Wallace's Reports, 5 (1873), where Field concurs in Bradley's dissenting opinion, holding that a state could not tax even the physical property, situated within its boundaries, of a railroad company which had been chartered by the United States and therefore was an agency of the federal government incorporated to carry out a national purpose; the case of *Welton vs. Missouri*, 91 United States Reports, 275 (1875), where Field, writing the opinion of the Court, lays down the doctrine that the "silence of Congress" on matters of interstate commerce over which it has exclusive jurisdiction indicates its intention that such commerce is to be free and untrammelled, and, further, that a tax purporting to be a license tax on an occupation is unconstitutional if it discriminates against the products of other states; the case of *Gloucester Ferry Company vs. Pennsylvania*, 114 United States Reports, 196 (1884), where Field also writes the opinion of the Court and holds that a state cannot tax a company which acts as an interstate carrier by imposing charges "other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property;" the case of *Corson vs. Maryland*, 120 United States Reports, 502 (1886), in which an act of the state of Maryland is held uncon-

In matters other than those concerning the commerce of the country, Field's great object was to preserve the independence and integrity of the individual states. It is scarcely, therefore, to be wondered as that he was devoted to the protection of the com-

stitutional which required a non-resident merchant, desiring to sell by sample in the state, to pay for a license to do such business a sum to be ascertained on the basis of the amount of his stock in trade in the state where he resided and had his principal place of business; the case of Pullman's Palace Car Company vs. Pennsylvania, 141 United States Reports, 18 (1890), in which Field again concurs in the dissenting opinion of Bradley who asserted that railroad cars running through a state have no *situs* there for purposes of taxation; the case of Massachusetts vs. Western Union Telegraph Company, 141 United States Reports, 40 (1890), where Field dissents from the opinion of the Court upholding the constitutionality of a state act taxing the capital stock of a foreign telegraph company doing an interstate business in the proportion which the length of the lines of the company within the state bore to the total length of lines of the company; the case of Harman vs. Chicago, 147 United States Reports, 396 (1892), in which he holds invalid an ordinance of the city of Chicago imposing a license tax for the privilege of navigating the Chicago River upon steam tugs, licensed by the Federal Government and running on the Chicago River and the Lakes; and, finally, the group of cases,—among the very last which Field heard,—comprising Adams Express Company vs. Ohio, 165 United States Reports, 194 (1896); Henderson Bridge Company vs. Kentucky, 166 United States Reports, 150 (1896); and Adams Express Company vs. Kentucky, 166 United States Reports, 171 (1896), in which he concurs in the dissenting opinion of Mr. Justice White, whose views were that a state could tax only the actual value of the physical property of an express company situated within the state, and not its value with reference to the company as a going concern or in connection with the use of the company's property and operations in other states. These are only some of the more important cases which illustrate Field's sympathy with the doctrine that no individual states should be construed to have the power to burden interstate commerce in the slightest degree, by the imposition of a tax in whatever form applied.

monwealths not only as against the threatened encroachments of Congress, but also as against the citizens of the states themselves. If a state is to be potent it must have elements of dignity and even of sovereignty; its great powers of taxation, police and

Indeed it was not only in tax cases that Field showed his great loyalty to this principle. We see him deciding that a state act regulating the method of delivery of telegraphic despatches is unconstitutional so far as it attempts to regulate the delivery of such despatches at places situated in other states (*Western Union Telegraph Co. vs. Pendleton*, 122 United States Reports, 347 (1887)); that a state act is invalid which forbids common carriers to bring intoxicating liquors into the state without first obtaining from the county authorities a certificate that the consignee is authorized to sell such liquors within the county (concurring opinion in *re Bowman vs. Chicago & Northwestern Railway Company*, 125 United States Reports, 465, (1887)); that a state cannot prohibit the sale of oleomargarin colored to look like butter, if such coloring is not done for a fraudulent purpose, that is, with the intent to deceive purchasers (dissenting opinion in *re Plumley vs. Massachusetts*, 155 United States Reports, 461, 1894), and that a state cannot prevent the killing of animals for exportation purposes and the exportation of the animals when killed (dissenting opinion in *re Geer vs. Connecticut*, 161 United States Reports, 519, (1895)). Field was an ardent disciple of the doctrine that no state can of itself say that any given article should or should not be imported or exported. If certain merchandise was generally considered a proper subject of interstate commerce, no state could, by a fiat, declare that it was not, and thus place the transportation of such merchandise beyond the regulating power of Congress. In *Bowman vs. Chicago & Northwestern Railway Company*, 125 United States Reports, 465 (1887), he says: "What is an article of commerce, is determinable by the usages of the commercial world, and does not depend upon the declaration of any state." And again: "If the states have the power asserted to exclude from importation within their limits any articles of commerce because in their judgment the articles may be injurious to their interests or policy they may prescribe conditions upon which such importation will be admitted, and thus establish a system of duties as hostile to free commerce among the states as any that existed previous to the adoption of the Constitution." And in *Geer vs. Con-*

eminent domain must not be frittered away nor impaired. Field, therefore, in common with the more able of his associates, took a firm stand against any interpretation, either of the organic law or of particular charters or contracts, which might militate against the inviolability and permanency of these powers of the states. No one more eagerly than he proclaimed the doctrine of the inalienability of the police power of the state.²² No one, save perhaps Miller, protested more vigorously than he against the doctrine that the state could barter away its power of taxation,²³ and no one more consistently than he sought to evade the effects of the Court's adopted view to the contrary by construing corporate charters as not involving a renunciation of that power.²⁴ No one set forth more clearly than he the evils of a judicial concession to the state of the power irrevocably to grant away the public lands of the

necticut, 161 United States Reports, 519 (1895), he declares that: "When property, like the game birds in this case, is reduced to possession it becomes an article of commerce and may be the subject of sale to the citizens of one state or community or to the citizens of several," and proceeds to argue that Congress has absolute control over interstate commerce and that a state cannot confine consumption of an article of commerce to its own borders.

²² As an example see his concurring opinion in the case of *Butchers' Union Company vs. Crescent City Company*, 111 United States Reports, 746 (1883).

²³ *Home of the Friendless v. Rouse*, 8 Wallace's Reports, 430 (1869).

²⁴ Dissenting opinion in the *Bringhamton Bridge Case*, 3 Wallace's Reports, 51 (1865); the *Delaware Railroad Tax Case*, 18 Wallace's Reports, 206 (1873); *Asylum vs. New Orleans*, 105 United States Reports, 362 (1881).

commonwealth held in trust for its people.²⁵ But although Field wished the states to be all powerful within their own borders, he was not an advocate of their right to exercise their powers for a dishonorable purpose or in such a way as to violate the express restrictions of the Constitution. He had no patience with that protection of states' rights which, invoking the provisions of the eleventh amendment, would sanction the repudiation of their honest debts.²⁶ Nor was he a believer in an unrestricted police power of the state. In his view of the matter that power allowed the state to regulate, but not to prohibit, occupations;²⁷ to control the use of, but not to confiscate, property;²⁸ and, under no consideration, to interfere with the powers given by the Constitution to Congress.²⁹

²⁵ *Illinois Central Railroad Company vs. Illinois*, 146 United States Reports, 387 (1892).

²⁶ Dissenting opinion in *re Louisiana vs. Jumel*, 107 United States Reports, 711 (1882), and *Cunningham vs. Macon & Brunswick Railroad Company*, 109 United States Reports, 446 (1883).

²⁷ Dissenting opinion in *re Powell vs. Pennsylvania*, 127 United States Reports, 687 (1887); *Dent vs. West Virginia*, 129 United States Reports, 114 (1888). But the right to sell intoxicating liquors may be withdrawn by the state; see his concurring opinion in *re Bartmeyer vs. Iowa*, 18 Wallace's Reports, 129 (1873).

²⁸ *Lawton vs. Steele*, 152 United States Reports, 133 (1893).

²⁹ *In re Ah Fong*, 3 Sawyer's Reports, 144 (1874). In this case Field says: "It is undoubtedly true that the police power of the state extends to all matters relating to the internal government of the state, and the administration of its laws, which have not been surrendered to the general government, and embraces regulations affecting the health, good order, morals, peace, and safety of society. Under this power all sorts of restrictions and burdens may be imposed having for their object the advancement of the welfare of the

The greatest of all our current economic problems,—the curbing of enormous aggregations of capital,—was not so important a question during the period of Field's activities on the Supreme Court bench as it has since become, but as far as the problem presented itself he showed that he was not in sympathy with the reckless bestowal by the states of valuable franchises upon private corporations. Monopolies were absolutely hateful to him, as witness his power-

people of the state, and when these are not in conflict with established principles, or any constitutional prohibition, their validity cannot be questioned. It is equally true that the police power of the state may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries; that the state may entirely exclude convicts, lepers and persons afflicted with incurable disease; may refuse admission to paupers, idiots, lunatics and others, who from physical causes are likely to become a charge upon the public, until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone. The legality of precautionary measures of this kind has never been doubted. The right of the state in this respect has its foundation, as observed by Mr. Justice Grier in the *Passenger Cases* in the sacred law of self-defence, which no power granted to Congress can restrain or annul.

"But the extent of the power of the state to exclude a foreigner from its territory is limited by the right in which it has its origin, the right of self-defence. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to state control or interference. To that government the treaty-making power is confined; also the power to regulate commerce with foreign nations, which includes intercourse with them as well as traffic; also the power to prescribe the conditions of migration or importation of persons, and rules of naturalization; whilst the states are forbidden to enter into any treaty, alliance or confederation with other nations."

ful protest against the granting of them in the Slaughter-House Cases, and Butchers' Union Company vs. Crescent City Company. But Field was by no means an opponent of wealth honestly acquired, and he was a stanch defender of the "sacred" rights of property. As he had braved unpopularity by reason of his decisions in the anti-Chinese cases, so he subjected himself to much partisan criticism because of his decision in the income tax cases, *Pollock vs. Farmers' Loan and Trust Company*,³⁰ in which he concurred with the opinion of the Court, holding that a tax on the rents of real estate is a direct tax within the meaning of the Constitution and therefore invalid unless levied in proportion to population, and also denouncing the provisions exempting from the tax incomes of less than four thousand dollars. The act itself he considered a vicious attack upon capital, and the "first step to a war between the rich and the poor." We have seen enough of Field to know that he was above all class prejudices and any legislation aimed against a particular class was distasteful to him.

As early as the decisions in the so-called Granger Cases,³¹ Field had taken the position, which he consistently maintained, that the Legislature had no right to confiscate or attack property rights under any guise whatsoever. In his dissenting opinions in

³⁰ 157 United States Reports, 429 (1894).

³¹ Reported in 94 United States Reports, pp. 113, 155, 164, 179, 180, 181.

those cases he asserts that the word "property," as employed in the fourteenth amendment, means not only the title to and the possession of property, but also its use, which indeed is the most important element of its ownership. Therefore for the state to interfere with the profitable use of property is practically to confiscate it. Any attempted regulation of the rates to be charged by "*quasi-public*" corporations he regards as little better than socialism. He contends that such enterprises are no more devoted to a public use than is any other business undertaking; in one sense the public has an "interest" in every industry. Only when property is actually dedicated by its owner to public uses, or when its use has been granted by the government, or special privileges in connection with it have been conferred by the Government, can it properly be said to be of such a public nature that the state can control its use by limiting the amount of profits which may be derived from it. And since the reason why the Legislature cannot impose maximum rates of charge upon corporations is because such an act would amount to a confiscation of the corporations' property, the state cannot gain such power merely by reserving in the charters of incorporation the right to alter or repeal them, since that reservation merely removes the disabilities arising from the impairment of the obligation of a contract clause of the Constitution.

The same careful regard for vested property rights

is manifested in all of Field's opinions.³² Likewise he was a profound believer in the protection of the liberty of the individual. The famous opinions of the Court which he wrote in *Cummings vs. Missouri*, and *Ex parte Garland*,³³ contain his classical definition of an *ex post facto* law,—“one which imposes a punishment for an act which was not punishable at the time it was committed; imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.” Measuring the constitution of Missouri by the standard thus imposed he finds that the clause requiring certain specified persons, if they wished to continue the practice of their professions, to take an oath that they had not committed certain designated acts, constituted an *ex post facto* law, and was therefore unconstitutional. Not less noteworthy was his dissenting opinion in *Brown vs. Walker*.³⁴ In that case Congress had passed an act, which provided that no one should be excused from testifying before the Interstate Commerce Commission on the ground that the evidence might tend to incriminate him, but that no person should be prosecuted for anything concerning which he might have testified be-

³² Dissenting opinion in *re Sinking Fund Cases*, 99 United States Reports, 700 (1878); *Church of Jesus Christ vs. United States*, 136 United States Reports, 1 (1889); *Lawton vs. Steele*, 152 United States Reports, 133 (1893).

³³ 4 Wallace's Reports, 277, 333 (1886).

³⁴ 161 United States Reports, 591 (1895).

fore the Commission. The Supreme Court held that this act was valid and proper, but Field contended, dissenting from the Court's opinion, that the act violated the fifth amendment which provided that no person should be compelled in any criminal case to be a witness against himself. A quotation from his opinion will show the sturdy vigor with which he defended the personal rights of citizens to the fundamental liberties secured by the Constitution:

No different protection from that afforded by the amendment can be substituted in place of it. The force and extent of the constitutional guarantee are in no respect to be weakened or modified, and the like consideration may be urged with reference to all the clauses and provisions of the Constitution designed for the peace and security of the citizen in the enjoyment of rights or privileges which the Constitution intended to grant and protect. No phrases or words of any provision, securing such rights or privileges to the citizen in the Constitution are to be qualified, limited or frittered away. All are to be construed liberally that they may have the widest and most ample effect. No compromise of phrases can be made by which one of less sweeping character and less protective force in its influences can be substituted for any of them.³⁵

These cases amply demonstrate Field's devotion to the principles of constitutional liberty,—but in none of them did he maintain his loyalty to his conceptions of justice at greater personal sacrifice than in his decisions on the question of the deportation of the Chinese. Field was a Californian, and he

³⁵ Compare his opinion on the right of government officials to open and inspect mail to detect violation of the postal law. *Ex parte Jackson*, 96 United States Reports, 727 (1877).

perhaps realized as keenly as his fellow-citizens in that state that the influx and continued residence there of large numbers of Asiatics were harmful to the best development of the state and indeed threatening to the perpetuity of American civilization. It has already been pointed out that in the Chinese Exclusion Cases, Field subordinated his usual methods of constitutional interpretation to his eagerness to arrive at what he conceived to be a patriotic result. But even such a consideration was unimportant to Field if that result could be attained only by a violation of the fundamental principles of individual liberty,—indeed to Field, patriotism and an advocacy of policies opposed to such liberty were necessarily incompatible. He believed that government had no higher function than to protect the citizens in the exercise of their rights and freedom, and indeed not only its citizens but other persons as well. Therefore when the Supreme Court, in *Fong Yue Ting vs. United States*,³⁶ sustained the validity of the act of Congress providing for the deportation of Chinese not having a specified "certificate of residence," Field vigorously dissented, in an opinion which is an eloquent protest against race prejudice, inhumanity and barbarity, and which places friendly alien residents upon the same plane, and entitles them to the same protection, as citizens. And on the same ground, in *Wong Wing vs. United States*,³⁷ he as

³⁶ 149 United States Reports, 698 (1892).

³⁷ 163 United States Reports, 228 (1895).

strongly contended, in his concurring opinion, that Congress had no right to imprison Chinese residents without trial, or to confiscate their property, and that the guaranties of the fifth and sixth amendments applied as well to them as to any other persons within the boundaries of the United States. These are among Field's finest opinions,—terse, vigorous, and of great rhetorical power, breathing forth in every line his sincerity, forcefulness and a breadth of mind unusual in one whose life was so largely and exclusively devoted to judicial labors.

Field ascended the bench of the Supreme Court of the nation in May, 1863, and resigned his seat there in December, 1897. During this period of thirty-four years and seven months,—the longest service of any member of the Court since its creation—his opinions covered every field of constitutional law, and into whatever domain he entered he carried with him his rich knowledge of the law and his profound veneration for our federal system of government. It is almost impossible to conceive that a question should ever present itself to the judiciary which has not already, in some form, been illumined by one of his opinions. True, however, as is this statement of the scope of his work, it is perhaps just as incontrovertible that his influence on the development of our constitutional jurisprudence has not on the whole been as profound as that of either Bradley or Miller. The fact is that Field was not a partisan; he had not the same fixity of political views and purposes that

characterized some of the other justices of the Supreme Court, and naturally therefore his influence was not as much concentrated in any one direction or tendency. But from the opinions of no other jurist can the student of law obtain saner and clearer conceptions of the principles of sound government and true liberty than from those of Mr. Justice Field. He loved right, and he strove no more eagerly to foster the glories of a great country than to obtain justice for the lowliest of its people.

MORRISON REMICK WAITE.

MORRISON REMICK WAITE

From a photograph by Lisdeath, 1888.



MORRISON REMICK WAITE.

1816-1888.

BY

BENJAMIN RUSH COWEN,

*Late Clerk of the United States Courts, Southern District of Ohio.**

MMORRISON REMICK WAITE, seventh chief-justice of the United States, was born at Lyme, Connecticut, November 29th, 1816, and died at Washington, District of Columbia, March 23d, 1888, having passed the allotted period of three score and ten years.

He was a son of Henry Matson Waite, a Doctor of Laws, a graduate of Yale College and a chief-justice of the Supreme Court of Connecticut. His great-grandfather and his grandfather were justices of the peace, and Marvin Waite, a great-uncle, was a Presidential elector at the first election held under the Federal Constitution, and voted for George Washington for President in 1789. He was also for nineteen terms a member of the Connecticut Legislature, and a judge of the County Court. Later he was one of the commissioners to survey, appraise and sell the lands in Ohio, known as the "Western Reserve," the proceeds of which became

* General Cowen died on January 29th, 1908.—Ed.

the liberal endowment of the Connecticut School Fund.

That connection of his great-uncle with the early affairs of Ohio may have influenced Mr. Waite to consider favorably the suggestion of his uncle, Mr. Horace Waite, a merchant located at Maumee City, Ohio, to cast in his fortunes with the new state.

Mr. Waite's mother was a daughter of Colonel Richard E. Selden, of Lyme, and a granddaughter of Colonel E. Selden, of the Revolutionary army, of Puritan stock, and of a family distinguished and honorable in the early annals of Connecticut.

From this heritage of honor and patriotism, of refinement, of culture and of moral strength, supplemented by an elementary education in the excellent local schools and academies, Mr. Waite went out to the larger, broader training to fit him for his life work. This he found at Yale College, but thirty miles from his home, where among his classmates in the class entering in 1833, were Edwards Pierrepont, later Attorney-General in the cabinet of President Grant, Wm. M. Evarts, Attorney-General in the cabinet of President Johnson, and Secretary of State in the cabinet of President Hayes, and Benjamin Silliman, Jr., the eminent scientist and publicist, from which class he graduated in 1837. Samuel J. Tilden, the Democratic candidate for President in 1876, an eminent lawyer of New York City, also matriculated in the same class, but removed to another institution before his graduation.

It was from such a home, under the inspiration of such an ancestry and with such a training, that, waiving any influence that might be presumed to attach thereto in his own locality, and, preferring to carve out for himself an independent career, unaided by family or ancestral prestige, Mr. Waite came to the State of Ohio, in 1838, at the age of twenty-two, and located at Maumee City, in the northwestern part of the state, at the head of navigation on the Maumee River, which was then and bade fair to continue to be the social and commercial metropolis of that section of the state. Here he completed the law studies which he had prosecuted for a year under the tutelage of his father, and was admitted to practice in 1839, at once entering into partnership with his preceptor, Mr. Samuel M. Young, a leading lawyer of that section.

At the time of his location there, Maumee City had a population of less than eight hundred; the population of Ohio was less than one million and the northwestern part of the state was sparsely settled, the Indian title thereto having been extinguished only a few years before.

That part of the state then and for many years thereafter was malarious and unhealthful, and was known as the "Black Swamp." The County of Lucas, of which Maumee City was the county seat, was organized in 1835, and in 1838 had less than ten thousand population. In 1838 came the great drouth, during which no moisture fell in all that

section from May to October, the earth refused her increase, and an epidemic of sickness pervaded the entire Maumee country. The county and the state were yet staggering under the crushing effects of the panic of 1837, which had wrought financial paralysis of all business enterprises, and the many brilliant schemes which had flowered so propitiously in the Maumee Valley were suddenly withered before their fruitage. Calamity and disaster prevailed. By reason of its insanitary condition, its lack of transportation facilities, its roads, practically impassable for five months in the year, and the other drawbacks referred to, it might have been regarded by most persons as an unpromising locality for the establishment of any enterprise, commercial or professional.

It was into those unpromising conditions that Mr. Waite projected himself in the vigor and enthusiasm of his young manhood, and in which, despite its drawbacks and discouragements, he became an active and influential agency for the betterment of those conditions. That he chose that locality under the circumstances argues much for his sagacity and ability to recognize its natural advantages. The subsequent phenomenal prosperity of that part of the state vindicates the wisdom of his selection.

His genial and unaffected manner, his sunny disposition, his ready adaptability to his new environment, his transparent honesty, unselfishness and sincerity of purpose, soon won for him troops of friends

whose confidence never wavered during his subsequent career.

The law practice of that time was totally different from that of to-day. The work in office and library which now occupies so much of the time of the legal practitioner was practically unknown. Therefore, the "case lawyer" had not been heard of. Libraries were few and incomplete. The time now occupied in office work was largely taken up in "traveling the circuit," generally on horseback, with sordid accommodations, over almost impassable roads and unbridged streams. These hardships, however, had their compensations. They had in them both education and discipline. The young attorney must rely upon the stored resources of his student days to fight his battles, with little opportunity for preparation in special cases. This required and naturally developed a quickness of perception, an alertness of action and a courageous self-reliance than which there could be no better school. Mr. Waite's vigorous constitution and his physical training in outdoor exercises fitted him to cope successfully with all those hardships, so that they were rather a help than a hindrance to his advancement.

There was novelty and seductive promise in all this to a well equipped, healthy, ambitious and appreciative young lawyer. It put him on his mettle, so to speak, and it was Mr. Waite's endeavor to surmount all such obstacles. Furthermore, in those days there were no large estates, and lands were

cheap, so that the amounts involved in suits were small and the fees were meager, but they made up the bulk of the practice of the average lawyer, on which he must depend for his income.

By reason of the conditions referred to the practice was for some years largely confined to the adjustment of financial complications, the foreclosure of mortgages, the clearing up of titles, and the collection of debts, and it was that class of practice which engaged the principal attention of Mr. Waite for the first years of his professional experience. So that in the law of real estate and the status of legal titles, he became a recognized authority. That practice, so largely growing out of the wreckage left by the panic of 1837, with the attendant errors and the double dealing so often resorted to, to prop a falling fortune, developed in Mr. Waite an unusually successful business lawyer. That practice combined with his legal skill, sturdy common sense, and thorough knowledge of business methods, prepared him to be an intelligent adviser on all business questions. No device of fraud could be concealed in the manipulation of accounts which he could not unravel. It was these qualities which gave Mr. Waite the important, commanding and useful position he then attained and held in his entire district, and which made him an important factor in establishing the business interests of the northwestern part of the state on a sure foundation, where they have since remained.

Mr. Waite utilized the lessons of that rude and homely school and, strengthened and educated thereby, he rose rapidly in the esteem of his associates and of the community, so that he early became recognized as one of the best equipped and wisest counselors of his community.

It was here, under such circumstances and in such practice, Mr. Waite established himself and won his way in his profession. Removing to Toledo, near the mouth of the Maumee River in 1850, when that place was chosen as the county seat, and when it was evident that Toledo instead of Maumee City was to be the future metropolis of the northwestern part of the state, he there remained until his removal to the wider field. There he associated himself with his brother Richard, and the firm of M. R. & R. Waite became one of the best known law firms of the state.

Mr. Waite's experience at the bar probably differed little from that of his contemporaries. If he had any advantage over his competitors it was because he was unusually careful, painstaking, conscientious and devoted to his profession from the start, ever mindful of his duties, not only to his client, but to the Court, and with these qualities uppermost, he slowly, but steadily and surely won his way to the front rank.

It is due to Mr. Waite to say that, notwithstanding the exacting duties of his practice, he was not unmindful of his higher duties as a citizen. When

the Civil War broke upon the country, he was in thorough sympathy with the policy of the administration, and was one of the trusted advisers of the ruling powers of the state in carrying out the same. Though absorbed in professional duties, he was often consulted by the executive of the state in regard to the promotion of its policy, and the carrying out of details, and never failed to respond promptly and cheerfully to such demands.

It was in this connection the writer first became acquainted with Mr. Waite, and this acquaintance grew into an intimacy which continued until his death. These consultations brought him to the attention of Governor Brough, who, in 1864, recognizing his ability, urged him to accept a position on the bench of the Supreme Court of Ohio, to fill a vacancy. That offer was promptly declined, as Mr. Waite had no desire for official position, though he continued as one of the most trusted and intelligent advisers of the state authorities as long as there was necessity for his counsel. Mr. Waite's brother and partner, Captain Richard Waite, was an active and efficient member of the Military Committee of his county during the war period, and also rendered valuable service to the state authorities.

During the years referred to, Mr. Waite's devotion had been toward the winning of such rewards as come to the faithful lawyer in the line of his profession. Never was he seduced from that high mark except in 1849, when he was elected a member

of the Ohio Legislature, where he served with credit. At this session, historic because of its results, his distinguished predecessor, Mr. Salmon P. Chase, was elected United States senator, his first entry on the field of national politics. To that election, however, Mr. Waite did not contribute, as Mr. Chase was elected by a combination of the Democratic members with the two "Free Soil" or abolition members who held the balance of power, and Mr. Waite was a Whig. In 1852, he was defeated as a candidate for membership in the Constitutional Convention on the final collapse of the Whig party, and in 1862, after having reluctantly consented to stand as a candidate for Congress in a triangular contest, he was defeated in the political "slump" of that year. His personal popularity in the last case, however, was shown in the fact that he received the vote of more than three-fourths of his constituency of Lucas county.

It is impossible to say what influence Mr. Waite had during the years of his practice, in the development of the law of the state, as it is impossible to say what influence any lawyer of general practice, then or now, no matter how eminent, had or has in such development.

How is the law developed? Who contributes most or materially in that behalf? Is it the lawyer who devotes himself carefully, industriously and conscientiously to aid the Court to the correct solution of a disputed question, with an eye single to

his obligation, which imposes an equal duty to the Court and to his client; or is it the lawyer who comes with arrogant manner and assumed superior forensic ability, and endeavors to assert the prestige of his standing to confuse the Court or jury; who regards his duty to his client as paramount, and considers himself successful only when he has gained his cause, and who has won the plaudits of the populace by reason of such success?

We often hear lawyers referred to as men of "national reputation," which has come to mean in the parlance of the day that Washington, New York, or some other great center must be the theater of one's operations and the only point from which radiates the information that establishes such reputation. Those who look to such centers alone for great lawyers, are prone to forget that there are men of well-trained, keen and rugged intellects all over the country, modestly and quietly, but with absolute fidelity and skill, discharging the duties of professional life, many of whom like Mr. Waite, are equipped for the highest position in the profession.

Is it not rather the lawyer who, true to his "jealous mistress," the law, contributes to keep right or set right its landmarks, and as new questions arise, aids to solve them correctly; who, discovering errors in the statute, aids the Court to correct them, who best contributes to the development of the law?

The duty of the lawyer to his client should be

subordinate to the duty of coöperation with the Court to administer justice. Absolute fidelity to the Court is not only the first duty of a lawyer, but an essential to real success. Such is the obligation of his oath, the violation of which is certain failure sooner or later. This means frankness at all times in the fullest measure; unwavering coöperation in the attainment of justice. The Court sits to be instructed, not misled or confused. ✓

Mr. Waite, himself, may be called to testify in this behalf. The writer heard him state on a certain occasion after his confirmation as chief-justice, that a certain well-known gentleman of the Ohio bar, was "the best lawyer I (he) ever knew." The gentleman to whom he referred was born, was reared and passed his whole professional life in a village in Ohio, of less than twelve hundred population, and would not change his residence to a larger place, although receiving many tempting offers to do so. His practice, however, was coextensive with the state, and though he had never appeared in the Supreme Court of the United States, as had not Mr. Waite at the time of his appointment, he was a familiar figure in the state Supreme Court.

The best evidence of the standing of Mr. Waite at the Ohio bar, and in the opinion of his neighbors prior to his appointment as chief-justice, was shown in the fact, that, though his party affiliations were pronounced and well-known, he was unanimously elected a member of the Constitutional Convention

in 1872, and on the assembling of that Convention, which included in its membership many of the most eminent lawyers of the state, regardless of partisan feeling, all eyes were at once turned to him as a fitting person for the presiding officer of that body, and he was elected without serious opposition.

His discharge of the duties of that position confirmed the estimate of his colleagues, so that on the death of Chief-Justice Chase, probably the first suggestion of Mr. Waite as his successor came to the President in a telegram from two eminent lawyers of that Convention, Judge William H. West, of Bellefontaine, and Henry S. Neal, of Ironton, who telegraphed a request to the President for Mr. Waite's appointment as his successor.

The practice of Mr. Waite, prior to his appointment as chief-justice was confined to the state courts. He had never appeared in the Supreme Court of the United States until he took his seat as chief-justice, except in the previous year, when he was admitted to practice in that Court on motion of his colleague, Mr. Caleb Cushing, on their return from the Geneva Conference. His next appearance in that august tribunal was March 4th, 1874, when he took his seat as chief-justice.

✓ Mr. Waite's supposed unfamiliarity with the Supreme Court practice and methods gave rise to unpleasant friction when he came to the bench. There are, of course, peculiar rules and methods of practice and questions of etiquette in that as in all courts,

which have acquired more or less of binding force by reason of long standing. But the same laws and decisions govern all courts in this country and may become familiar to all practitioners. It was, no doubt, considered by the presiding associate-justice, that inasmuch as Mr. Waite was personally inexperienced in the rules and methods of the Court, it would be well for him to stand by a few days and observe the traditional movements of the dignified tribunal, so that when he had time to familiarize himself therewith, he might then take charge and preside with less embarrassment.

For a better understanding of the circumstances under which Mr. Waite came to the bench of the Supreme Court, and to explain the friction referred to, permit the statement of certain facts, of which the writer is probably the only living witness. Mr. Chief-Justice Chase, after eight and one-half years' service in that position, died May 7th, 1873, at the age of sixty-five, during President Grant's second term. For more than eight months, the suspense as to a successor continued. The laudable ambition to fill the vacancy awoke the desire in the minds of many men of theretofore unsuspected longings, who yearned for the dazzling honor. It would be a task beyond the design of this paper to catalogue the expectants, who doubtless daily scanned the capital news to see if they had been drafted for the place. Suffice it to say that several of the associate-justices, who were understood to be of the party in power,

were not only expectants, but some of them were literally demandants of the honor. The President early decided that no associate-justice would be appointed, though that decision was not made public. The struggle between a sense of the proprieties due their position and their masterful desire for the promotion was interesting, not to say humiliating.

It was not generally known at the time, but it is a fact that the position was first offered to Mr. Roscoe Conkling, a senator in Congress from New York. He was then in the prime of life, forty-five years of age, a leading figure in the senate, and at the zenith of his intellectual and political power. He had brilliant qualities as a lawyer of national repute, of large, varied and successful practice, an orator in the highest sense of the word, of fascinating presence and commanding influence. He was withal a great admirer and the trusted friend and champion of President Grant and his policies. That offer was not made public, and was quietly and unostentatiously declined for the reason, as Mr. Conkling stated, that he did not wish it to be said of him that he had accepted any reward for his devotion to the President.

Mr. Conkling out of the way, the first formal appointment to the place was that of Mr. Caleb Cushing, of Massachusetts, then a resident of Washington. That appointment came in the nature of a surprise to the country, and probably to the distinguished beneficiary himself. There were good

reasons for such surprise. Although Mr. Cushing was one of the most distinguished lawyers of his day, had had a remarkable career as soldier, diplomatist, legislator, jurist, and publicist, he was then seventy-three years of age, was not a member of the party in power, and had never been understood to be in sympathy with its policies even during the Civil War. He was looked upon generally in Washington as a cloistered student and a recluse, who had turned his back upon a world which had ceased to attract him, and upon a society he could not longer interest.

The writer was present at the cabinet meeting at which the appointment of Mr. Cushing was announced. Returning to the department, Senator Sargent, of California, a townsman of Mr. Cushing at Newburyport, Massachusetts, who was a caller, was informed of the appointment, as the nomination had already gone to the senate and could be no secret from a senator.

"I will stop that nomination very promptly" said the senator, who was highly indignant.

Whereupon, he went at once to the War Department, where he unearthed a letter which Mr. Cushing had written Mr. Jefferson Davis early in 1861, recommending a friend who was the agent for a patent gun of vaunted destructive power, with which he wished to equip the Confederate army. As soon as that letter was shown to the President, the name of Mr. Cushing was withdrawn.

Again the lists were open, drooping spirits of aspirants were revived and their claims renewed. A few days later the appointment was apparently settled by the nomination of Mr. George H. Williams, of Oregon, then Attorney-General of the United States. Judge Williams had occupied judicial positions in two states, had been a senator in Congress, and a member of the Alabama Claims Commission. He was fifty years of age, stalwart, brawny and vigorous in mind and frame, genial and popular and a lawyer of recognized ability. His appointment seemed one eminently fit to be made, but it was the signal for the opening of all the sewers of scandal and abuse for which the capital was then famous. Not a man whose claim Judge Williams had rejected, or whose purpose he had thwarted, but joined in the hue and cry against him. His domestic affairs were dragged into the light and presented in hideous distortion. None of these things seemed to move the President, but the senate delayed action for some weeks because of them.

Thus the matter of the confirmation of the appointment stood until Judge Williams at a cabinet meeting in January, 1874, urged the President to withdraw his name from the senate. This he had already asked on several occasions, but at this time the President reluctantly withdrew the nomination.

It is necessary to go back a little in point of time and introduce a new figure, and one which later bore a leading part in the contest for the position.

In 1871, President Grant was called upon to appoint three men as counsel to represent the United States before the Geneva Arbitration Commission.

After selecting Mr. Evarts and Mr. Cushing, he appointed the late Stanley Matthews, of Ohio, an eminent lawyer, and later an associate-justice of the Supreme Court, but at the last moment withdrew his name and substituted that of Mr. Morrison R. Waite, of Toledo, Ohio. All those appointments were promptly confirmed by the senate, and the appointees served in those positions with great credit.

While Mr. Waite was in Washington preparatory to his departure for Geneva, he had an opportunity to become better acquainted with the President, who had met him only casually theretofore, on whom he made a favorable impression. That impression was confirmed by Mr. Waite's conduct before the Geneva Commission. The Commission was the creature of the Treaty of Washington of 1870, and in the magnitude of the issues involved, being the question of peace or war between two leading world powers, in the dignity of its composition and setting, it was one of the most important international tribunals in the world's history and perhaps the most significant step theretofore taken toward the settlement of international controversies by arbitration.

To be chosen to appear before that tribunal as the representative of one of the great contending parties, was an honor which comes to few men. Two of the

three counsel, Mr. Evarts and Mr. Cushing were men of large experience in national affairs, of recognized learning and ability. For the third, the President, looking to the west, passing over men who were regarded as more prominent, of larger experience, and therefore presumably better qualified, and recognizing the qualities of Mr. Waite, as they were represented to him, gave him the appointment.

To Mr. Waite was assigned the duty in that Commission of collecting the evidence and preparing the arguments in reply to Sir Roundell Palmer, British counsel, upon the question of the liability of the British government in permitting Confederate war vessels to be supplied with coal in British ports for hostile operations against United States shipping, with the knowledge of that government. This was a broad field of inquiry, not upon the law, for that was well settled, but upon the facts and on the question of the knowledge of the British government. Here was a field for the exercise of the highest skill, industry and judgment. That the duty was well-performed is attested by the judgment of that tribunal which was a full recognition of all the principles our counsel had claimed, and an award of damages greater than counsel had hoped.

Counsel returned in September, 1871, to meet the plaudits of our government and our people. A crisis had been passed; our claims had been recognized, war had been averted, and a precedent had been established, the beneficial influence of which

has been continuous. By his labors in that behalf, Mr. Waite established a reputation for industry, acumen and ability second to neither of his distinguished colleagues, and at once became a national figure in the profession.

By reason of the reputation gained by the work of Mr. Waite at Geneva, and of subsequent intercourse on his return, the President seemed quite ready to hear suggestions and arguments as to his fitness for the office of chief-justice immediately after the death of Chief-Justice Chase. As opportunity offered from time to time, Mr. Waite's friends presented his name and suggested his appointment both before and after the appointments of Mr. Cushing and Judge Williams, and continued to do so on all proper occasions.

Among those who were most active in urging the appointment of Mr. Waite, were the late Mr. Columbus Delano, of Ohio, then Secretary of the Interior, General I. R. Sherwood, a member of Congress from Mr. Waite's district, the late Mr. Samuel Shellabarger, an eminent Ohio lawyer located in Washington, and the writer, who was Acting Secretary of the Interior during the entire time of the vacancy. Mr. Waite's chances were also promoted by the hostility of certain citizens of Ohio, the animus of whose opposition was well understood.

The day Judge Williams' name was withdrawn the writer was present and sat beside him at the cabinet table. When his name was withdrawn, the

writer suggested to the President that it seemed a proper occasion to renew the suggestion of Mr. Waite's appointment, and that it appeared he might yet have to go to Ohio for an appointee.

"That I shall do cheerfully," said the President, "as I am favorably impressed with Mr. Waite's fitness for the place."

After some discussion and further consideration of names, the nomination of Mr. Waite was made January 21st, 1874, and sent to the senate.

In November, 1873, while Mr. Waite was President of the Ohio Constitutional Convention, the writer wrote a member of that Convention not to be surprised if the President robbed the Convention of its presiding officer to make a chief-justice. This was done on the strength of the President's favorable reception of all suggestions as to Mr. Waite's appointment. After his appointment and confirmation, Mr. Waite told the writer he had been shown the letter referred to, but that it seemed so incredible at the time that he had not taken it seriously, which goes to show that he was one of the members of the profession who did not seem to harbor a desire for the place.

As an illustration of Mr. Waite's well-balanced character the fact is mentioned that while he was presiding over the Ohio Constitutional Convention he received a telegram from Washington advising him of his appointment as chief-justice. That telegram he read and laid aside as if it was an ordinary

matter and without remark proceeded with the business in hand as if nothing unusual had occurred. Later when the appointment became known to some of the members of the Convention, a motion was made to adjourn to afford an opportunity to congratulate the President, which motion was promptly ruled out of order, and the business proceeded until the regular hour for adjournment. ✓

To the surprise of Mr. Waite's intimate friends who knew of his personal qualities and his fitness for the place, he was received by the members of the Supreme Court with a coolness bordering on discourtesy, and this treatment continued even after he had qualified and taken his seat.

"Tantæne animis cælestibus iræ."

At a dinner given the Chief-Justice on his arrival in Washington after his confirmation, at which most of the associate-justices were present, and before the liquid refreshments had "qualified the crudities," so to speak, the writer sat beside Judge Williams, at the foot of the table, which position accorded a good profile view of all the guests. "Did you ever see so many corpses at one funeral?" said Judge Williams, *sotto voce*, as he glanced down the table. Following his glance, the admission of his suggestion was a foregone conclusion.

The peculiar circumstances attending the appointment of Mr. Waite, gave rise to many *bon mots*, one of the best contributed being from the late Judge E. Rockwood Hoar, at the dinner already referred to, ✓

who, alluding to the nominations of Mr. Cushing and Judge Williams, said Mr. Waite was "that luckiest of all individuals known to the law, an innocent third party without notice."

Mr. Waite was confirmed and took his seat as Chief-Justice March 4th, 1874. The same day, on the rising of the court, he came to the office of the writer, evidently in considerable perturbation, and said he came for counsel. After much hesitation he said:—

"Those fellows up there," jerking his head toward the Capitol, "want to treat me as an interloper. I was met to-day by the senior associate-justice who has been presiding since the vacancy, with the suggestion that, as I am a stranger to the Court and its methods, I would better allow him to continue to preside for a time until I learn the formalities of the Court. Now, I do not want to be considered unamiable or unreasonable, but before I act, I want your opinion, as a friend, as to what I shall do under the circumstances."

"Do," said the writer, indignantly, who knew far better than did Mr. Waite, how some of the associate-judges had treated him in the matter of the appointment, "I would go up there to-morrow, get on the box, gather up the lines and drive and give them to understand that I was the Chief-Justice."

The suggestion seemed to satisfy him, though he said no more on the subject at the time, but he was evidently worried at the way he had been treated

by his colleagues, for he was a man of the most genial and kindly nature. The following day, on the rising of the Court, the Chief-Justice again called at the office and appeared in great good humor. To the inquiry as to how the suggestion of the day before had operated, he said: "Splendidly! splendidly! I acted on your suggestion literally. I got on the box as soon as I arrived there this morning, gathered up the lines and drove, and I am going to drive, and those gentlemen know it," and he spoke with great determination.

If he received any further slight from his colleagues, the writer did not know it, as he never directly, or indirectly in the subsequent fourteen years of his service on the bench and of our acquaintance, referred to the subject. But from that moment he assumed his rightful place with the ease and familiarity of a trained jurist fitted to preside.

All the members of the Supreme Court at the time when Mr. Waite came to the bench have crossed the Great Divide to appear before the Greater Assize, and it may not be good form to allude to these personal matters. But in justice to Mr. Waite and to emphasize his peculiar qualities which enabled him to soften asperities, allay jealousies and to win and retain the confidence of his colleagues, and to convey an intelligent idea of some of the minor embarrassments which met him at the outset, these statements are made. They seem necessary to illustrate some of the most admirable traits of his character

which contributed materially to his after success on all lines.

This was the man and these were the conditions under which Mr. Waite took his seat as chief-justice of the Supreme Court of the United States. Until his connection with the Geneva Arbitration Commission, he was little known as a lawyer outside his own state and had never appeared in the Supreme Court as an advocate. It is therefore little to be wondered at that this nomination as chief-justice was received by leading statesmen and the bar of the country generally with serious misgivings. The appointment naturally excited inquiry, challenged objection, aroused jealousy, and provoked unfriendly criticism. It should also be noted that the appointment of Mr. Waite came at a critical time, and when there was an unusual increase in nearly all branches of the business of the Court. The rapid and enormous growth of capital and corporate franchises; the construction of railroads and the new questions arising therefrom; the amendments to the Constitution and the reconstruction legislation thereunder, imposed an enormous amount, and a new class of business on the Court. Considering the many new questions which confronted the Court, it is not too much to say that the fourteen years of Mr. Waite's service were fraught with more and greater difficulties, demanding more labor, learning and ability than in any other period in our history. That the work was well done is the highest tribute

to the character, the integrity and impartiality of the presiding justice.

The constitutional amendments and the reconstruction legislation were then recent, and much doubt was expressed by leaders in Congress and in the country as to Mr. Waite's ability or fitness to cope with the important issues involved. Notably Mr. Sumner expressed great anxiety as to Mr. Waite's probable attitude on subjects in which he was greatly interested. He was evidently looking for a John Marshall to fill the vacancy. He was assured that Mr. Waite was a thoroughly trained lawyer, of distinguished and patriotic ancestry, of large general practice, careful, painstaking and conscientious and had been in thorough sympathy with the policy of the Government during the war and, while no one had any right to speak for him on any subject which might come before him on the bench, his whole life was a guaranty that he could be relied upon to do the right thing as he saw the right. Furthermore, Mr. Sumner was assured that if he would make *profert* of a well authenticated John Marshall, the name of Mr. Waite would be promptly withdrawn. ✓

To the bar of the country and to the mass of the people outside of Ohio, as has been said, Mr. Waite was an unknown quantity. But, the closer the investigation, and none was ever closer, the more searching the inquiry, and none was ever more searching, it fell upon an open record on which was neither spot nor blemish. After all that examina-

tion doubters became satisfied; critics were silenced, and when the question of confirmation came up in the senate, not a dissenting voice was heard.

It is due to Mr. Waite to note the suddenness with which he allayed the jealousies, secured the confidence and esteem of his colleagues, and reduced the routine of the Court to an orderly, efficient and harmonious working which continued without interruption during his entire administration.

A member of the Court, senior in commission to Mr. Waite, and who had at least maintained a receptive attitude during the vacancy, said of Mr. Waite at the memorial services in the Supreme Court:

The oldest member of this Court knows no one who was better fitted to discharge the administrative duties of the office of its chief-justice, or who ever did so with more acceptability to his associates and to the public at large.

Absolute frankness prompts the statement that in the minds of some of the closest friends of Mr. Waite, and even of some of those who had favored his appointment there were lurking doubts, not as to his honesty, ability or fitness for the duties of the office, but as to his temperament and his predilections toward the questions involved in the constitutional amendments and the reconstruction measures. Those amendments and those measures were the outgrowth of a rampant radicalism which, however, must be judged from the standpoint of that time. The writer was in thorough sympathy with the

policy which then prevailed and which had produced the amendments and the legislation referred to.

Mr. Waite was eminently conservative in his every fiber. After he came to the bench, and in the first year of his service, his decision in *Minor vs. Happersett*,¹ a unanimous decision, and again in the following year, in *United States vs. Cruikshank*,² Justices Clifford and Hunt dissenting, in regard to the effect of the 14th amendment, were calculated rather to increase than to allay the apprehension referred to. The first case was brought to decide whether women could exercise the right of suffrage under the 14th amendment to the Constitution of the United States. That amendment had been adopted in 1868, as a part of the so-called reconstruction measures, and not in aid of woman suffrage, or any other desirable change.

When Chief-Justice Waite came to write the opinion, he adopted the same line of judicial thought taken by Chief-Justice Taney in the *Dred Scott* case; that is, he showed that contemporary understanding had always excluded women from voting. The wisdom of experience had changed the tone of the former opinion. It was then announced that the province of the Court is "to decide what the law is, not what it should be." Thus, through a Republican Chief-Justice but nine years after the close of

¹ 88 United States Reports, 162.

² 92 United States Reports, 542.

a war to the precipitation of which the decision of his illustrious predecessor had so largely contributed was that decision of unpleasant memory followed and affirmed.

Aside from the question of woman suffrage that opinion broadly concludes by a unanimous Court "that the Constitution of the United States does not confer the right of suffrage on anyone." Yet, it should be pointed out, that somewhat later this part of the decision was reversed. Later, the Court speaking by Mr. Justice Miller declared in *Ex parte Yarbrough*:³

That a government whose essential character is Republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the Legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, or corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. . . . If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption. . . . It is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the states, refrained from the exercise of these powers, that they are now doubted. . . . It is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States. . . . The states in prescribing the qualifications of voters for the most numerous branch of their own Legislatures do not do this with reference to the election of members of Congress. Nor can they prescribe the qualification of voters for those *eo nomine*.

³ 110 United States Reports, 651.

The decision of Chief-Justice Waite, as above cited, may then be briefly distinguished by saying that the phrase: "The Constitution of the United States does not confer the right of suffrage on any one," should be read "the Constitution of the United States (*alone*) does not confer the right of suffrage on any one," inasmuch as a few sentences farther on the right to vote for members of Congress is positively declared to be fundamentally based on the Constitution.

In 1875, in *United States vs. Reese*,⁴ the question of suffrage again came up and the decision of the Supreme Court speaking by the Chief-Justice (Clifford and Hunt dissenting) was such as to leave little protection for a voter, unpopular "on account of race, color, or previous condition of servitude." In this decision the Chief-Justice speaking for the majority of the Court, declared of the 15th amendment as he had of the 14th in the former decision, that it "does not confer the right of suffrage on any one." Hence a law which Congress had enacted in language apparently broad enough "to cover wrongful acts without as well as within the constitutional jurisdiction," could not be so construed as to "operate only on that which Congress may rightfully prohibit and punish," and the indictment of the election officers for refusing to receive and count a vote failed. The dissent of Mr. Justice Clifford was merely technical, he holding that the indictment did

⁴ 92 United States Reports, 214.

not aver a tender of the tax for the non-payment of which the vote was refused, but merely averred an offer to pay any sum which might be due and a refusal.

Probably the meaning of the Chief-Justice was not so severe as might be inferred from what has been said, inasmuch as later in *Board of Supervisors vs. Stanley*,⁵ it appeared that there was no intention to deny generally the principle that part of a statute may be good and part void, but that "it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear."

In this case the Court was divided into three sections and lacked the influence of a strong leadership.

In what has been said the eminent conservatism of Chief-Justice Waite must be apparent.

In these decisions looked at from the light of to-day, I can see that Chief-Justice Waite possessed in a high degree that quality which made Chief-Justice Marshall great. It was not so much Chief-Justice Marshall's knowledge of precedents as his understanding of those deeper currents of the national life lying far beneath the turmoil of partisan strife, which enabled him to see both the trend of thought, and the unconscious purpose of the people and to interpret that purpose for them.

These cases are referred to in this connection to

⁵ 105 United States Reports, 305.

emphasize the statement that in the light of to-day, when men's blood has cooled, when their views have matured under the influence of passing events, when the sober second thought has come and later decisions have explained and supplemented those earlier decisions of Mr. Waite, few men of sober judgment doubt that Mr. Waite was steadily right regarding those amendments, and future generations will honor the court over which he presided for guiding the Nation safely through the perils which threatened when he came to the bench.

In this connection it is proper to refer to the wholesome and curative influence exercised by Mr. Waite in allaying the prejudice and healing the differences between the North and the South, growing out of the Civil War, the reconstruction measures and the constitutional amendments. On his coming to the bench it fell to him at once to preside over the Federal Courts of the Fourth Circuit, comprising the states of Maryland, Virginia, West Virginia, North Carolina and South Carolina. The "bloody chasm" still yawned, and the drastic amendments and reconstruction measures seemed but to widen the breach.

Into this condition Mr. Waite was at once projected as the presiding judge, a stranger to that people and presumably out of sympathy with them because of his political and sectional predilections. But it may be said, in honor of his fairness and his kindness of spirit that he at once allayed all appre-

hension and by his absolute fairness, won the confidence of the bar and the trust of those arraigned before him for trial. He suppressed all political and sectional animosity and tried parties on strictly legal grounds with fairness and impartiality. The best evidence of this is shown in the fact that there were no more genuine mourners at his bier, and no more eloquent tributes to his memory and to his eminent services than came from members of the bar of the Fourth Circuit.

There was a remarkable blending in Mr. Waite of physical, mental and moral powers. His natural endowment, his training and his previous practice had fitted him to endure a vast amount of labor with little apparent fatigue. He never seemed to be worried, or impatient, no matter what the demands upon his time. He loved his work and brought to it an aptness and facility seldom surpassed. In addition he was honest in the fullest sense of the word. So that as a practitioner he had never resorted to tricks or subterfuges in pleadings or practice, and was therefore, in a position to demand the same from all who came before him. His sense of justice was controlling. He sought to allay strife, not to provoke it; to remove prejudice, not to cater to it.

Personally, Mr. Waite, was ever gentle, cordial, approachable, never assuming an air of superiority by reason of his exalted position. In the midst of affairs, the exactions of society at the capital must have been at times extremely burdensome, in the dis-

charge of which he could not but have become cognizant of the many rumors of foibles, evils and improprieties with which that atmosphere reeked, and which formed the burden of current gossip, but he was never known to make an unkind comment or to indulge in censorious criticism.

It was rarely counsel received from Mr. Waite undeserved reproof; and all over the country are attorneys to-day who came first into the presence of that court during his term who remember with pleasure his encouraging attention and words. The saying of Sir Edward Coke that "law is the perfection of reason" is trite. Is it not however, equivalent to saying that law is the perfect expression of common sense? Common sense marks the career of all jurists, of all men in fact, we regard as great. Another necessary attribute to success is untiring industry. Mr. Waite was so endowed that these qualities must have contributed largely to his successful discharge of the duties of his office.

It may be said that while Mr. Waite's chief distinction may not have been genius or talent, and while he had fine power and intellect, and a capacity for attention which is more useful as a rule than genius, his leading characteristic and that which gave him peculiar weight in his deliverances was the controlling force of moral and religious principle. This served to concentrate his actions and his impulses on worthy objects. The moral power was ever present and all-controlling.

Our country has long outgrown the power and the capacity of the courts to discharge the duties such growth has imposed. The conscientious discharge of those duties means a devotion to work almost beyond human endurance, and the judge who would meet such demands must

Scorn delights and live laborious days.

He must forego those frequent occasions for relief that men in ordinary occupations enjoy, and devote his days and nights to the discharge of those duties. This Mr. Waite did, and for fourteen busy years he was never absent from his post save during a brief illness in 1885. Those were years of the sacrifice of comfort, of ease and of pleasure to the service of his country in discharge of the duties of his office. His last opinion has been referred to, that on the Telephone cases, in which by the way, his successor, Mr. Fuller, appeared as counsel, the decision of which, prepared by him, occupies the entire 126th volume of the United States Reports. As a fitting close to his career, the same volume contains a record of the memorial services of the court on the occasion of his death, for he survived the delivery of that decision but four days, and the great labor bestowed thereon unquestionably shortened his life.

As a rule, all of his decisions will be found to be characterized by clearness, brevity and force, always confined to points at issue, and never wandering into unnecessary discussions.

They will also be found uniformly simple in style, clear in statement, direct in argument, and certain in determination. The arguments in the Telephone cases, already referred to, together with the consultations of the court had occupied weeks. Those cases involved scientific questions of great intricacy, questions of fact the most perplexing, and questions of law absolutely novel. To examine and resolve those questions, so many of them without precedent to guide and assist, fell to the lot of the Chief-Justice, and was a labor of months. As a statement of scientific principles and the law applicable thereto, that decision is regarded by the profession and by the scientific world as a masterpiece. ✓

That Mr. Waite did not shirk the weightier duties devolving upon the Court during his administration may be inferred by the number and the character of the cases assigned to him in which to prepare the opinion of the Court. Nearly all the opinions relating to the rules regarding the jurisdiction of the Court in cases originating in the United States Courts, or in cases removed from State Courts, were written by him. He also wrote opinions in cases arising under customs laws, patent laws and public land laws, and in many cases involving questions of commercial law and the rights of railroads and other corporations. In addition to these as we have seen he wrote many of the opinions announcing the judgment of the Court in cases settling the rights of citizens under the 14th and 15th amendments. ✓

Several of the opinions of the Court under the so-called reconstruction measures were also written by the Chief-Justice.

The years of his service were eventful in other respects. Beside his many opinions in cases involving important questions as to the rights of citizens and his disposition of motions and miscellaneous business, he administered the oath of office to Presidents Hayes, Garfield, Arthur and Cleveland.

Enough has been said to show that the highest reward did not come to Mr. Waite as the result of transcendent genius or brilliant qualities. His most intimate friends never claimed such traits for him. It came to him rather as a result of such patient, honest and faithful effort in his daily work as any man of the same qualities may bring to the discharge of the duties of his profession.

The industry of Mr. Waite has been referred to and it may be said to have been a striking trait in his character. The best proof of that is his early acquired eminence in a profession which holds no prizes without application; a profession whose treasures are largely concealed in books but which demand the alembic of thought and equipment to uncover; which offer no temptation to imagination or taste; to eminence in which there is no royal road, but which comes only as a reward of patient application.

We may have no Thurlow, Coke, Eldon or Bacon on our Supreme Bench. They were all learned

jurists, but the glory of their talents was dimmed by moral defects and mental deficiencies not necessary here to indicate. We may not boast of such a line, but we can do far better. We can point to a body of men who for one hundred and seventeen years have honored our highest judicial tribunal, and will rank with the noblest and the best the world has known. No taint of bribery, corruption or dishonor ever attached to them. They have deserved as they have received the confidence of the people in fullest degree.

We recall with pride the massive intellect, the conclusive logic and the formative genius of Marshall, the incisive analysis of Taney, the learning and ornate grace of Story, and the ripe experience of Chase, but without disparagement to any of his distinguished predecessors it may be said of Mr. Waite that his mind was so well balanced, his industry so masterful and the judicial temperament so perfectly developed, that he discharged his duties in such manner as to sustain the high position attained by that court, honoring the public service and reflecting glory on his country.

The high character of his predecessors might well appall one less well equipped, yet while impartial criticism may not assign to him the highest rank, it is not too much to say that in the soundness of his judgment, in the thoroughness of his research, in the clearness of his statement of legal principles, and in his admirable administrative skill and tact, he was a

worthy successor of his more brilliant predecessors, and that he adorned that profession to which the administration of justice and the care of our civil institutions are specially confided.

So that the qualities referred to, insure Mr. Waite a place in that honorable class which makes up the great mass of the good and useful lives of every age and nation; a class whose influence proceeds from high motives united with that persistent devotion to duty which governs human affairs.

When Mr. Waite took his position as chief-justice, he put aside all other ambition, and when in 1876 he was urged to stand for nomination for President, his sense of propriety revolted at the suggestion, and he wrote a friend:

Any one who would exchange my office for that of the Presidency don't deserve mine. . . . No friend of mine, if he thinks for a moment, will ever consider it possible for a chief-justice to become a president.

Living, as we do, at a time when the atmosphere reeks with rumors and proofs of degeneracy and with substantial grounds for humiliation, it is a privilege to be able to dwell upon such a character as Mr. Waite's and it is a credit to our civilization that it was so generally understood and appreciated, and met such generous recognition.

WILLIAM JOSEPH ROBERTSON.

WILLIAM JOSEPH ROBERTSON

From a photograph taken when Judge Robertson was sixty-five years of age.



WILLIAM JOSEPH ROBERTSON.

1817-1898.

BY

ARMISTEAD CHURCHILL GORDON,

of the Virginia Bar.

LYING along the eastern base of the Blue Ridge Mountains in Virginia, and including within its area the old counties of Culpeper, Orange, Albemarle and a part of Louisa, is a country whose peculiar physical characteristic is the vivid color of its soil. It is a fertile land of well-watered farms, set amid rolling hills, and affording always the view of a landscape restful and pleasing to the eye of the beholder. Beyond any unusual singularity of this good red earth, however, is the glory which it possesses of having been the birthplace and the home of statesmen, soldiers, scholars, lawyers and men of affairs, whose lives have illustrated and adorned the noblest records of human achievement.

When Philip Pendleton Barbour, first elected in 1814 to the United States House of Representatives, of which some years later he became the Speaker, resumed his seat upon the conclusion of his maiden speech in that body, John Randolph of Roanoke, then in the zenith of his fame, stepped forward, and

holding out a bony hand in greeting, piped in his shrill treble that he was glad to see that the Red Hills of Piedmont still produced great men. It was no insignificant compliment to Barbour for it included him, at the hands of a competent and relentless critic, in a roster of illustrious names.

Here amid the Red Hills had been born or had lived four of the earlier presidents,—Jefferson, author of the Declaration of Independence; Madison, expounder of the Federal Constitution; Monroe, promulgator of an imperial doctrine which has preserved the western hemisphere to Americans; and Zachary Taylor, soldier and patriot. Here resided for many years William Wirt, son of the Bladensburg tavern keeper, who became by force of his talents the attorney-general of the young Republic, learned lawyer and man of letters; here was born and here lived Thomas Walker Gilmer, governor of the commonwealth and later Secretary of the Navy, killed by the explosion of the cannon on the ill-fated Princeton; here was the home of James Barbour, governor, senator and Minister to England; here dwelt Hugh Nelson, statesman, congressman, Minister to Spain; and here were born, and here lived and died Thomas Mann Randolph, of the illustrious family of his name, son-in-law of Jefferson, and Governor of Virginia; William Cabell Rives, United States Senator and Minister to France; and Dabney Carr, patriot and eloquent orator, who having moved the resolutions in the Virginia House of

Burgesses in 1773 for the appointment of the Committees of Correspondence, died in the morning of his genius.

Here, too, lived Joshua Fry, soldier, of Somersetshire, England, Oxford graduate and Professor of Mathematics in the College of William and Mary, map-maker with Peter Jefferson, member of the Colonial Council, and Commander-in-chief of the forces of Virginia, who perishing in the expedition of 1754 against the Indians, was succeeded as commander by his young lieutenant George Washington. Here was the birth-place of Thomas Sumter, illustrious patriot general of the Revolution, senator from South Carolina, and Minister to Brazil. Here, too, was the home of John Walker of Belvoir, United States Senator, and aide to Washington; of Meriwether Lewis, who opened the pathway of American civilization to the Pacific; of Thomas Walker of Castle Hill, commissary-general of the Virginia troops in Braddock's army, Indian commissioner, explorer and boundary-maker; of George Rogers Clark, soldier and pioneer, whose name is linked with the romantic story of Kaskaskia and Vincennes; of Edward Coles, first governor of the state of Illinois; of Andrew Stevenson, member of Congress, Minister to the Court of St. James, and Rector of the University of Virginia; and here, too, lived in his last days James Waddell, "the Blind Preacher," the old man eloquent, born on the Atlantic Ocean, on the emigrant voyage of his parents

from Ireland to America, and called by the sailors "child of the ship and star," immortalized by Wirt in the pages of "The British Spy," under whose preaching "audiences were irresistibly and simultaneously moved as the wind shakes the forest."

Nor does this roll-call exhaust the roster. As the English essayist, in recounting the story of the great state trial in Westminster Hall, where was gathered an array of forensic talent, theretofore and since unparalleled in modern history, says of the youngest of the counsel for the prosecution, yet surviving when the words were written, that "those who have listened with delight till the morning sun shone upon the tapestries of the House of Lords to the lofty and animated eloquence of Charles, Earl Grey, are able to form some estimate of the powers of a race of men among whom he was not the foremost;" so it may be written of these Piedmontese Virginians that at the mere mention of the names already given, many other noble figures, scarcely less conspicuous, recur to the memory as worthy to be counted in the splendid muster roll of them whom Randolph called "the great men of Piedmont."

William Joseph Robertson was born in Piedmont, Virginia, in the county of Culpeper, on the 30th day of December, 1817, of Scotch parentage, and spent his life in the Piedmont County of Albemarle. His father, John Robertson, was of the ancient family of the name, in the north of Scotland, among whose most distinguished representatives

there have been the historian, William Robertson, whose fame rests upon "The History of Scotland during the reigns of Queen Mary and King James VI," and "The History of the reign of the Emperor Charles V," and the Jacobite poet, Alexander Robertson of Struan, who was "out," both in the "Fifteen" and the "Forty-five" for the Stuarts, and led five hundred Robertsons on the battle field of Sheriffmuir. John Robertson came to Virginia in 1791 from his home in the city of Glasgow, where he was born just twenty-one years before, to adventure his fortunes in a new country. He had had the advantages of a classical education in his native land; and upon his arrival in Virginia, he opened, in Albemarle County, a school for boys, which he subsequently moved to Culpeper County, and which he taught with distinction and success. In 1715, he was married to Sarah Brand, the daughter of Joseph Brand, another Scotchman, who had settled in the county of Albemarle. The only child of this marriage was William Joseph Robertson, who was but a few months old at the time of his father's death in 1818.

With a keen appreciation of the value of an education in the humanities, his mother, who was a shrewd and able woman of great energy and force of character, sent her young son at the age of nine years to be taught by John Lewis, a schoolmaster of Llangollen, in Spottsylvania County. Lewis had been a lawyer, and had law-students as well as aca-

demic pupils under his instruction. His academic branches were English, mathematics and Latin; while the boys who would know Greek were put under the tutelage of an Episcopal clergyman of the neighborhood. The chief end of Mr. Lewis' teaching, said Judge Robertson of him in after life, was to make his pupils understand and appreciate the beauties of thought and expression in the standard Latin authors, and to translate these authors into pure and idiomatic English. Mr. Lewis found that, while his young pupil's mind was very active, and his inclinations strongly set in the direction of study, his physical strength was inadequate to the mental tasks allotted the other boys of his age; and so, wisely required him to take a great deal of out-of-doors exercise, and to devote a larger amount of time to the recreation of his body than to the development of his mind. The subsequent health and strength of the man through a longer period of persistent and indefatigable labor than is given to be the portion of most of us, proclaimed the judgment and sound sense of the Llangollen school-master; and Judge Robertson was accustomed in after years to declare that he owed to Mr. Lewis' treatment of him, when a little lad, his physical vigor and his large capacity for work. It was no slight benefaction thus bestowed by the wise preceptor; for in these gifts of health and physical ability for laborious exertion were laid for his pupil the corner-stones of his most useful and illustrious career.

But it is not to be supposed that his years at Llangollen were devoted entirely to the recreation of his bodily health. Under Mr. Lewis' interested direction he was imbued with the first principles of that language which later enabled him to become a Latin scholar of large acquirements,—a study which he kept up with unflagging interest as long as he lived; and here, too, was developed the love of English letters, with which his mother had already begun to inspire him, and which came, in its ever continuous growth by what it fed on, to make him a master of accurate verbal expression, and to endow him with a literary taste that was unimpeachable.

"A lawyer without history or literature," says Sir Walter Scott in "Guy Mannering," "is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect." So that it may be well said of Judge Robertson that it was at Lewis' school at Llangollen that the plastic mind was shaped, as the physical frame was developed, out of which grew the great legal architect, who became in his generation easily *primus inter pares* in his own commonwealth; and who was by the consensus of the best who knew him a foeman worthy of the stoutest steel in all the states.

He remained at Mr. Lewis' school two years; and later, while yet very young, entered the University of Virginia. Here, although he did not apply for an academic degree, though graduating in a num-

ber of its independent schools, then as now maintained under the elective system, he is said to have "attested his capacity to learn and his power of application." Continuing in the academic department of the University for two sessions, at their close he engaged in teaching for yet another two years; and then returned to the University, where he studied law and graduated with the degree of Bachelor of Laws.

Upon his graduation he commenced in 1841 the practice of his profession at Louisa Court House, Virginia; but in a short while moved to the town of Charlottesville, then as now the seat of the University of Virginia, where he resided and continued in active practice, save for the period of his occupation of the bench of the Supreme Court of Appeals of the state, until his retirement a very short time before his death.

At the local bar of his adoption he gained business from the beginning, impressing all with whom he came in contact with the loftiness of his character, the mastery which he possessed of his profession, and the energy and ability that he displayed in the management of his cases. The bar of Albemarle County, of which the town of Charlottesville is the county seat, has always held a high position in the commonwealth for its character and ability; and here the young lawyer encountered an array of forensic and legal talent that doubtless contributed in no small measure to fire his ambitions and to recreate

his energies. Prominent among them were General William F. Gordon, statesman and orator,—a formidable antagonist in a jury case; Valentine W. Southall, one of the most learned jurists and persuasive advocates of his day in Virginia; and of the younger men, Egbert R. Watson, profound student and resourceful adept in the trial of causes, later a distinguished circuit judge of the commonwealth; Shelton F. Leake, powerful debater and jury-advocate, and famous among his contemporaries for his powers of sarcasm and invective; and George Wythe Randolph, grandson of Governor Thomas Mann Randolph, inheriting the talents of his illustrious ancestry,—later Secretary of War of the Confederate States.

In 1852 he was elected by the voters of the county to the office of prosecuting attorney,—“Attorney for the Commonwealth” is the dignified and old-fashioned title still persisting, and sometimes shortened into “Common-wealth” by the unlettered in their personal allocution of the incumbent. In this office he was a terror to the law-breaker; and here, too, he perfected himself in that art, which is the stumbling-block of many practitioners, but that in the hands of the adept becomes a weapon of attack as keen and effective as Saladin’s scimeter,—the difficult art of cross-examination,—in the use of which Judge Robertson was acknowledged by all to be a past master.

It was during his incumbency of the office of Commonwealth’s Attorney that he prosecuted a case, of

no very great importance in itself save to the actors in the little drama; but which, in the method of its conduct, and in its subsequent cementing of a long and lasting friendship, in which both prosecutor and prosecuted enjoyed a mutual pride and pleasure, serves to illustrate at least one side of the character of Judge Robertson. The famous Confederate partisan leader, Colonel John S. Mosby, was then a young student of the University of Virginia. In an unfortunate collision with a fellow-student, the latter was wounded by Mosby, who was indicted by the grand jury of Albemarle County, and put upon his trial in the Court House in Charlottesville. Many years later, after Judge Robertson's death, Colonel Mosby wrote of this case in a personal letter as follows:

I have known him forty-five years. During that time it has been my fortune to be thrown into intimate relations with many of the best and brightest men of the country, but I have never met one who more deeply impressed me with his pure and lofty character. As you may know, the circumstances under which we first met were not calculated to awaken a feeling of friendship between us. He was the prosecuting attorney for Albemarle County; I was just nineteen years old, and on trial in court on a criminal charge for shooting. As the successor of two great leaders of the bar, Valentine W. Southall and Thomas J. Michie, he would naturally feel a desire to sustain their high standard as prosecutors. He prosecuted me, as it was thought, not only with great ability but with a great deal of zeal; but in neither of the powerful speeches he delivered in opening and concluding the case did he utter a word to wound the sensibilities of me or of my father, or that rankled in my memory after the trial was over. He dis-

charged a public duty with so much fidelity, but at the same time with so much delicacy, that no other sentiment was inspired but one of respect. I very well remember his saying to the jury that it was a cup which he wished might have passed from him.

You may remember that I was sentenced to pay a fine, and to imprisonment in the county jail; but that on the petition of nine of the jurymen and a number of the citizens I was pardoned by the Governor and the fine released by the Legislature. A few days after the trial he had business with the jailer. I heard them talking at the front door. No doubt he thought it would be natural for me to feel some resentment at the vigor of his prosecution. I went to the door, spoke to him pleasantly, and extended my hand, laughing. He responded promptly, and came into the room. I had a book in my hand; he asked me what I was reading. I told him it was Milton's "Paradise Lost," but that I hoped soon to enjoy "Paradise Regained." The fact is, I read both poems before I was released. He made a playful allusion to John Bunyan's writing "The Pilgrim's Progress" in a prison cell. I remarked that I had determined to study law, and jocularly said, "The law has made a good deal out of me; I am now going to make something out of the law." He offered me the use of his library; his office was nearby. I remember borrowing Greenleaf on Evidence from him. Our acquaintance began at this meeting; it ripened into a friendship over which, in the vicissitudes of fortune through which I have since passed, not a shadow was ever cast.

The past rises before me. I recall the days of my wayward youth, and see again the actors in the first scene of the drama of a not uneventful life. All bitterness of feeling growing out of those events long ago passed away; my chief regret is that I could not do for my prison what Tasso did for his dungeon at Ferrara,—confer immortality upon it.

In 1859 Mr. Robertson was elected one of the judges of the Supreme Court of Appeals, of Virginia, to succeed the Honorable Green B. Samuels,

who died on the 5th day of January of that year. His election was by popular vote,—a system which prevailed in Virginia for a brief period antedating the war between the states, and in that time gave to the Commonwealth many of the ablest and purest judges who have adorned its bench. Judge William McLaughlin, of Lexington, Virginia, was accustomed to tell an anecdote of this judicial campaign in Virginia, which illustrates the fact that though character, ability and legal acquirements were regarded as essential qualifications for the wearer of the ermine, yet the partisan politics of that momentous period cut no small figure even in the choice of the judiciary. It was a time of storm and stress; and in the light of the tremendous struggle which succeeded, it is not strange that this should have been the case. Judge McLaughlin said that he was at the time, a young lawyer in the town of Lexington, living in a room adjoining his office, up a flight of narrow wooden stairs near the court house. On the night preceding the election of 1859—the year of the John Brown raid—he chanced to be engaged until a late hour upon some work which he had in hand. At about twelve o'clock in the night, he heard groping footsteps ascending the narrow stairway in the uncertain darkness. The door opened, and into the room stepped Major Thomas J. Jackson, then a Professor in the Virginia Military Institute at Lexington,—later “Stonewall” Jackson of the Southern Confederacy, of immortal memory. He invited

Major Jackson in, and asked him to be seated, wondering meanwhile what chance could have brought the stern and taciturn professor to his rooms at so unreasonable an hour. Jackson was not long in making known the object of his visit.

"I came to ask you for information," he said. "I must vote early in the morning, and I want to satisfy my conscience. I have an individual acquaintance with one of the two candidates who are before the people for the Court of Appeals. Mr. John B. Baldwin, who lives in the adjoining county of Augusta, is personally known to me to be a man of character, ability and learning in the law. I do not know Mr. Robertson. I am a Democrat, and I prefer to vote for the Democratic nominee, if he is the peer of his Whig competitor, Mr. Baldwin, in intellect and standing.

"Mr. Robertson," replied McLaughlin, "is well known to me. He is the equal of any lawyer in Virginia for ability and legal acquirements; and he is a gentleman of the highest personal reputation. In addition, he is a states-rights Democrat, of the strictest sect."

"I thank you," said Jackson, grimly. "Then I shall vote for Mr. Robertson," and he left the room as suddenly as he had come.

Judge McLaughlin's description of Judge Robertson was as accurate as it was succinct. He had even at that time become an acknowledged leader in the state, of a bar that possessed such members as

John B. Baldwin and Thomas J. Michie of Staunton; John Randolph Tucker, Robert Barton, Sr., Philip Williams and James Marshall of Winchester; John M. Patton and William Green of Richmond; Robert E. Scott of Fauquier; Sterling Claiborne of Amherst; Robert Whitehead of Nelson; James Garland and C. L. Mosby of Lynchburg, and a host of others whose names adorn the legal bead-roll of the commonwealth.

Of his contest for the Supreme Court judgeship with Colonel John B. Baldwin, a pleasant story is told which serves to show the kindly feelings existing between them, and the generosity which was characteristic of them both. Telegraphs and telephones were unknown then, and the means of communication being often slow and difficult, the results of elections were by no means ascertained and reported with the celerity and accuracy of the present day. The earliest apparently authentic news of the result of the campaign for the judgeship which reached Charlottesville was to the effect that Baldwin was elected. His competitor at once wrote and forwarded to him a letter of esteem and friendly congratulation. By the time the letter arrived at its destination at Staunton, forty miles away, Baldwin had learned of his own defeat and of the election of his adversary. He thereupon, with a characteristic sense of humor, though with an entirely genuine sincerity, struck out his own name in the address of Judge Robertson's letter and Judge

Robertson's signature at its end, and inserting the latter's address and subscribing his own name, returned his successful adversary's congratulations to him by the next post.

Judge Robertson's interest in politics was always keen; and to those who were privileged to hear his intelligent comments upon men and events in the political movement of the times, those comments seemed always as illuminative as they were usually pointed and caustic. Beyond his candidacy before the people for the two offices which he filled, and which were strictly in the line of his profession, he entertained no political aspirations. In the earlier period of his career, however, he frequently took part in the campaigns of the day, and advocated the doctrines and views of the party to which he belonged with a logic, a zeal and a degree of courage that gave him scarcely less distinction as a "campaigner" than he had achieved as a lawyer. It was characteristic of the mold of his mind that he was never satisfied, either in law or in politics, to be informed only of his own side of the matter. His investigation did not cease until he understood his adversary's position as thoroughly as he did his own. This intellectual quality is not inaptly illustrated in his once stating, jocosely, that during the days of the John Brown raid and of those just preceding the fall of Fort Sumter, he had been looked at somewhat askance by some of his fire-eating neighbors because he was a subscriber

for the New York Tribune,—a journal then regarded so incendiary by the pro-slavery element in the state as to cause Judge Robertson's lifelong friend, Mr. John Randolph Tucker, then attorney-general, to suggest its exclusion from Virginia;—and that yet after having made Mr. Greeley's political acquaintance, from the standpoint of a Calhoun Democrat, through the columns of that paper, he had at a later period been regarded by some of those same acquaintances as a Republican, because he refused to vote for its editor when nominated in 1872 by the Democratic party for the presidency.

Though he cared nothing for political preferment, he willingly and faithfully discharged such of the public duties of citizenship as were from time to time imposed upon him. He represented, among other trusts, the interests of the Commonwealth in the Central Railroad Company, which later was developed into the great railway system known as the Chesapeake & Ohio of which he afterwards was for years the general counsel; and he was for a while a valuable and influential member of the Board of Visitors of the University of Virginia.

But, after all else is said, it was to the practice of his profession that his life was given; and it is by the success which he achieved and the eminence which he attained in that practice that he will be known in the annals of Virginia's jurisprudence. The fineness of his nature, the delicacy of his sentiment, the energy and integrity of his character were

all so mixed and combined with his literary acquirements and his wide knowledge of the law in the alembic of his native intellect, as to make of him a great-hearted and great-minded type and illustration of the ablest and best nineteenth century lawyer. And it is to this memory of him, as to a fount of inspiration, that other noble and eager spirits of his calling must hereafter needs recur, and

"In their golden urns draw light."

His career on the bench, though covering a period of six years, constituted no very important part of his life's work. Four of those years were years of war; and in the clash of arms, the milder contests of the courts were neglected. During the whole time of his judicial tenure only twelve causes were assigned him for opinions. Yet it has been said of these opinions, few in number though they be, that they are masterpieces of lucid exposition, of penetrating understanding and of abundant citation of illuminative authority. Captain Charles M. Blackford of Lynchburg, Virginia, himself a distinguished lawyer who knew Judge Robertson well, and possessed a fine understanding of his ability and learning, said in a memorial of him before the Virginia State Bar Association in 1898:

The first case decided by him was *Hill and wife vs. Huston's Exor. and others*, 15 Gratt. 350, which was argued by Messrs. Thomas J. Michie and Peachy R. Grattan, and in which the Court held—Daniel, J., dissenting—that a party accepting a legacy coupled with a condition may bind himself to the perform-

ance of the condition, although the burden may exceed the benefit; but that to bind a party in such a case it must appear that he elected to accept the legacy and perform the condition with full knowledge of all the facts and circumstances necessary to enable him to make a judicious choice. And it further held that to make an election conclusive, the party must be informed as to the relative values of the things between which he elects.

This first opinion of Judge Robertson, continues Captain Blackford, is very characteristic of his mode of handling all questions of law submitted to him. He laid down the general principles clearly and with simplicity of expression, reaching the very right of the matter, and then cited every authority which could give the student light upon the question, and establish by precedent the validity of his conclusions. A close examination of every decision made by him will show this to be the habit of his mind; and one examining them critically will easily note the style of argument, which afterwards in the many great causes in which he was counsel, gave such power to his logic.

Perhaps one of the most interesting of his opinions, when considered in the light of his views of governmental policy, and the proper relations of the state to the federal authority, is that of *Burroughs and Abrahams vs. Peyton*.¹ Of this case Captain Blackford says:

Burroughs and Abrahams, under the conscript law of the Confederate States as it then stood, had put in substitutes and been exempted from military service by the prescribed formalities. The necessities of the Government subsequently required a repeal of the law permitting substitutes, and these two men were conscribed and turned over to Major Peyton for assignment in the army. They sued out a writ of *habeas corpus*, and the case was then brought to the attention of the Supreme Court, the

¹ 16 Grattan's Reports, 470.

Government by counsel (George Wythe Randolph) waiving the law suspending the writ of *habeas corpus*.

The Court held, Judge Robertson delivering its opinion, that Congress has the constitutional power to raise armies either by contract or coercion, and that a person who has put in a substitute is not thereby entitled to be discharged from service under a call made upon him by virtue of a subsequent law of Congress. It further held that Congress has no power to make a contract with a citizen debarring it from the right to call him into the military service of the country, and that the act authorizing a citizen to put in a substitute does not constitute a contract between him and the Government; and that even if it be a contract, it does not exempt the person who has furnished the substitute from any call made upon him. Under the principles thus defined the two conscripts were remanded to the custody of the officer, and were sent to the army.

Judge Robertson's opinion, comments Captain Blackford, is one of great interest and ability, evincing that tireless research which he gave to every subject that came under his consideration. He was a believer in States' Rights, of the Calhoun creed; and this case presented questions of possible conflict between the State and Federal authorities, which must have aroused his keenest apprehensions, and caused him to enter into the history of the Federal power in such cases with a care and caution which makes his decision a great state paper, and one which will ever be regarded as illuminating the text of the Constitution as to the questions involved in the litigation.

The logical and impartial character of his mind, in spite of the strength of his convictions upon all matters involving fundamental questions, was often illustrated in his estimates of men. Biography was one of his favorite subjects in letters; and he delighted in the discussion of the great characters of

history, whether contemporary or earlier—and especially of eminent lawyers and judges. The foregoing reference to the case of *Burroughs vs. Peyton*, involving, as it did, an interpretation of constitutional power, recalls the admiration which he entertained for the intellectual strength of one so radically different from himself in his views of the Federal Constitution as was Benjamin R. Curtis of Massachusetts. He regarded Curtis as a jurist of tremendous ability; and spoke of his dissenting opinion in the *Dred Scott* case, in which Curtis upheld the right of the Congress to prohibit slavery, and declared his dissent from “that part of the opinion of the majority of the court in which it is held that a person of African descent cannot be a citizen of the United States,” as masterly.

When the war between the states ended at Appomattox Court House, Virginia became District No. 1; and the judges of its Supreme Court of Appeals were removed from the bench by the order of the military commander. This removal proved no unwelcome visitor to Judge Robertson. His inclination, and the duty which he felt that he owed to a large family, combined to reconcile him to a return to the practice of his profession, at which he was assured he would soon regain an income larger than that of the inadequate salary of a judge; and which the physical results of the war made necessary in his case as in that of most others in Virginia. As soon as order was restored out of

chaos, and the courts were reopened, he formed a law-partnership in Charlottesville with Mr. S. Valentine Southall of that town, which was at once recognized as one of the ablest and strongest in the state. This partnership lasted for ten years; and has been characterized as "probably as distinguished as any ever formed in the Commonwealth." Work poured in; and as the years went by, the litigation with which Judge Robertson was connected continued to grow in the magnitude of the interests which it involved and in the wide physical directions in which it called him. He became the general counsel of the Chesapeake & Ohio Railway Company and of the Norfolk & Western Railway Company; and he was specially retained in almost all cases that concerned the larger interests of the great corporations of the state. His appearances were not only in the Supreme Court of Appeals of Virginia, the Supreme Court of West Virginia, and the Supreme Court of the United States, but in the Federal Circuit Courts and in the local Circuit Courts. It has been truly said that "many books might be made from his library shelves by collecting and binding together the numerous printed briefs and opinions which were the products of his pen, and which more than all else attest the magnitude of his practice, and show how intense his labor, how profound his learning and how skillful his forensic power."

Among the prominent cases in which he was en-

gaged in the Virginia courts, that were of more than ordinary interest, may be mentioned the Samuel Miller will case, involving the testamentary disposition of several millions of dollars, in which he maintained the validity and secured the establishment of the testator's will,—a result which, with others, contributed to the foundation of one of the noblest educational institutions in the south, in the Miller Manual Labor School in Albemarle County; the case of *Gibert vs. Railroad Company*,² involving perhaps the largest property interests ever litigated in any cause in the state; and in which the court, sustaining the views that he presented, established legal precedents which are now cited in similar cases throughout the country; the case of *Kirkham vs. Auditor of Petersburg*,³ involving great questions of constitutional interpretation; of *Atwood vs. Railroad Company*,⁴ and the *Fidelity Insurance Company vs. Railroad Company*,⁵ in which extraordinary financial values were at stake. In many of these cases he received fees that were very unusual in his native state, and some of which are said to have been the largest ever received at any time by any lawyer in the commonwealth.

He argued many cases before the Supreme Court of the United States; and a distinguished member of that court has declared that few lawyers appeared

² 33 Grattan's Reports, 586.

³ 76 Virginia Reports, 956.

⁴ 85 Virginia Reports, 966.

⁵ 86 Virginia Reports, 1.

before it to whom the judges listened with so much pleasure and profit. Of the most interesting of his cases in the Federal Supreme Court not only from a historical standpoint, and on account of the great principles involved, but as illustrating the lofty judicial impartiality in its decision of this greatest and mightiest of human tribunals, were the cases of *United States vs. Lee*, and *Kaufman vs. Lee*,⁶ in which he represented General Custis Lee, son of General Robert E. Lee, and which resulted in the recovery of compensation for "Arlington."

Another case in which he was engaged for quite a period of time, and that greatly interested him, was that in which he appeared as counsel for the state of Virginia before a commission, of which the late Judge Jeremiah S. Black of Pennsylvania was president, charged with the duty of determining the boundary line between Virginia and Maryland. This commission included in its membership, among others, the Honorable William A. Graham of North Carolina, governor of his native state, United States Senator and Secretary of the Navy under President Fillmore, who projected and carried out the expedition to Japan under Commodore Perry; and who died during its session. The commission was for several weeks in session in Philadelphia, and the argument of the case was followed with deep interest by many of the prominent lawyers of that city, who generally concurred in giving to Judge

⁶ 106 United States Reports, 196.

Robertson the meed of the highest distinction among his several associates on either side.

In July, 1888, a number of the most prominent lawyers and judges of the commonwealth met at Virginia Beach to organize a State Bar Association; and Judge Robertson was elected its first President by acclamation. He was not present at this meeting; but the fact that he had been chosen its official head contributed no little to assure the members of the bar in the state of the high character which the new organization was to take from its inception, and to presage the success which has made it a powerful influence in the profession and given it a distinctive position in the front rank of such associations.

At its first annual meeting at the White Sulphur Springs in the July following his election, he delivered the President's Address before the Association, saying:

I proceed to discharge one of the duties imposed upon me by the Constitution—that of making suggestions as to the work of the Association,—such suggestions as have occurred to me to be proper to be made at the present time. I have reduced them to writing, and will do what I have never before done, read what I have to say.

Among his suggestions was a powerful argument in behalf of the abolition in Virginia of the common law system of pleading, and the substitution of a code of pleadings and procedure. The proposition gave rise to vigorous controversy in the state

among the members of a profession constitutionally conservative; and it was strongly antagonized, especially by the older practitioners. But the fact of the advocacy by him of what was then regarded as so radical a step, illustrates the freedom of his mind from the shackles of custom, and serves to indicate how to the very end his intelligence was ever receptive to advanced ideas, no matter how violently the outer storms of prejudice or tradition might beat against them. The code procedure which he advocated has never come in Virginia; but the narrowness of the common law system of pleading has been greatly lessened by statutory provisions which permit the alternative use in many actions of far less artificial forms; and it may be truthfully said that the spirit which has contributed to bring about this change was fostered no little by Judge Robertson's courageous attitude towards the former situation.

The introductory statement made by him in beginning his address on the occasion named, that he would do what he had never done before,—read what he had to say,—has been related to emphasize his methods of work; and those methods cannot be better described than in the words of Captain Blackford,—with the preface, however, that whatever he wrote and whatever he said was alike written and said in a manner always as accurate as it was logical and convincing. Captain Blackford has said:

No lawyer was ever thrown with Judge Robertson, either as associate or as an opponent, who does not bear witness to the

immensity of the labor which he gave to every case which required attention at his hands. He had a physique which permitted him to work without ceasing, and under his theory of a conscientious discharge of duty to his client and his cause he never ceased to work. His great achievements proved this, without the testimony of those of his household, who could tell of his constant study, of his never-resting pen, and of the long hours spent as the light of the midnight oil paled before the approaching dawn. He took nothing for granted, and both in the collation of facts and the citations of precedents, he followed St. Paul's maxim by "proving all things and holding fast only that which was good." A narrative by his client of the facts of his case did little more than raise a presumption in favor of the truth of the statement. Clients were often much annoyed by this apparent want of confidence in their veracity, but they learned before the case was over, how inaccurate their account and how invaluable his caution.

. . .

He spared no pains to himself and required vast labor from those who committed their interests to his charge. No fact or incident in the transaction into which he was inquiring, was too small to deserve his attention and care. He stored them away that he might be master of the situation and beyond the possibility of surprise, but when he came to discuss them, he seized only the strong facts, ignoring trifles, except when skilfully used as make-weights, and hurled them with such power and such wonderful combination against his opponent that they became irresistible. . . .

He searched into and critically studied every decision bearing on the question involved, learning alike from those adverse and those in his favor. Having thus imbued his mind with all the learning upon the topic he was examining, he selected the leading cases and went through the same process of combining them into logical sequence, which he had already done with the facts, and with the like successful result. He quoted no great string of authorities to testify to his industry at the expense of his judg-

ment; and no court could overlook any case to which he made reference without great danger of committing an error.

If the length of the present paper permitted, it would be pleasant to narrate the more intimate side of Judge Robertson's life,—his delight in the study of the great classic authors of his own tongue, and his familiarity with them,—his critical acumen and his correct estimate of literature,—his fondness for poetry, which appealed after a fashion that the world, which saw him in the gladiatorial contests of the court room, little dreamed of, to the highly imaginative quality of his blood. It has been justly said of him that "he pursued great subjects as told by great authors, and pondered the thoughts and language of those who for ages had guided the pen and the tongue of our race. To the study of the Bible he devoted much time, and from it drew expressions and illustrations which brought him in close touch with courts and juries. He knew the writings of Shakespeare almost by heart, and quoted them with a freedom which marked the extent to which he had made them his vernacular. He rejoiced in the wisdom of Bacon and found delight in the fire of Byron's poetry. These were the masters whence he drew his inspiration, and in studying them he so trained his speech that its power was acknowledged of all men." His familiarity with what was best in English literature was not limited to the authors of the past whose writings have been attested classic by the verdict of time. The later

thought of the world, as shown forth in the works of the historians, the biographers, the philosophers and the essayists of the latter part of the nineteenth century inspired him with an eager interest. He knew the history of Freeman and the essay of Matthew Arnold as he knew Gibbon and Carlyle; and his general reading covered a remarkably wide range for one whose daily life was so busy as was his with the pursuit of his profession. His miscellaneous and literary library was added to and enlarged by him from year to year with the same assiduity and careful attention as that which gathered upon his office shelves all that was best from the teeming legal press. The memory of his books and of his constant resort to them recalls the fact that he was an enthusiast on works of reference, and this enthusiasm of his was indicative of that mental peculiarity which demanded the satisfaction in the last detail of his desire for enlightenment on any given subject.

One conspicuously distinguishing characteristic of him may not be omitted in any just estimate of his career,—a characteristic that has been dwelt upon with pride and gratification by very many of the younger lawyers of his state, who were at one time or another associated with him in the conduct of his causes. This was the generous attitude which he always bore towards his professional colleague. In "After the War" Colonel Mosby writes in the letter from which we have already quoted:

I was associated with Judge Robertson as counsel in a number

of important cases in which he was employed at my request. Some of them are reported in Grattan's Reports. He always insisted on treating me as an equal, and not as a junior. You may remember that last year you came to see me at the University Infirmary, and my telling you that Judge Robertson was the most generous associate that I had ever met at the bar. The ablest forensic speech I ever heard was his argument at Warrenton in the suit of Scott's administrator. As soon as he finished, I said to him, "I thought Mr. Tucker's speech in this case the finest I ever heard until I heard yours." Knowing his extreme modesty I said no more. He used my library in preparing his argument. I was not counsel in the case, but was familiar with the facts, and at the time was reading Jeremy's Equity Jurisprudence, in which there was a reference to a doctrine decided in the Great Fire of London case; and I called his attention to it. In his argument, he made a clear analysis of the case, and with great logical power showed that as a precedent it fitted exactly the case at bar. In concluding, he said that a young member of the bar had suggested the point to him.

In the Arlington case he was counsel for Gen. Custis Lee, and sent me a copy of his brief before the case had been argued in the United States Circuit Court. With some diffidence I wrote to him suggesting a point that might strengthen the case. He immediately answered, thanking me and expressing his concurrence. Judge Hughes told me that in his oral argument Judge Robertson informed the Court to whom he was indebted for suggesting the point.

I simply refer to these incidents to illustrate the nobility of his character. Although we have been parted so many years, I have always kept his picture in my room, and shall ever remember him as one of

"The dead but sceptred sovereigns who still rule
Our spirits from their urns."

A like testimony is that of Captain Blackford:

In conference he listened to every suggestion from every associate with the utmost deference, and imparted in exchange every possible suggestion in regard to the matter at issue which could be drawn from the resources at his command. He kept back nothing, and both in conference and during the trial was prompt to credit to an associate the most trivial suggestion or any view of the case, even though he might himself have given its first impulse. . . . When his associates were very young men, he not only gave them confidence and encouragement by the manner in which he listened to their views and acknowledged their suggestions, but divided the compensation with a lavish liberality, which, if not entirely just, was unjust only to himself.

Another lawyer, who began the practice of his profession at the local bar when Judge Robertson's fame was at meridian, has written of him:

No kind father or near relative could have been more careful and painstaking in giving advice and help, and I am proud of the fact that even now tears well up whenever I recall his generous aid. I regarded his retiring from active practice at our bar as a great misfortune to it. The high standard which he adopted in his practice, his unfailing courtesy in his office and in the courthouse, and his strict sense of honor were always invaluable object-lessons to the younger members of the bar.

"There is no heroic poem in the world," says the saturnine philosopher of Chelsea, "but is at bottom a biography, the life of a man; also it may be said, there is no life of a man, faithfully recorded, but is a heroic poem of its sort, rhymed or unrhymed;" and by the single acclamation of his contemporaries Judge Robertson's career, rightly written, would illustrate the text. His is approved a noble life, not only by its demonstration of the dignity of labor and

the beneficence of persistent and unflagging purpose in the pursuit and practice of the law, which is "the last result of human wisdom acting upon human experience," but no less by the profound significance of his moral influence in inculcating an ethical temper among his brethren of the bar, and establishing a renewed respect and confidence in law and lawyers among intelligent laymen.

Judge Robertson was twice married,—first on the 16th of August, 1842, at Edgeworth, her father's home in Albemarle County, to Hannah, eldest daughter of General William Fitzhugh Gordon, who died in Charlottesville on December 17th, 1861; and second, on the 16th of July, 1863, at Oaklands, Roanoke County, Virginia, to Alice, daughter of General Edward Watts, and widow of Dr. George Washington Morris of "The Grove," St. Paul's Parish, South Carolina, who survives him. Of the first marriage were born nine, and of the last five children.

Judge Robertson died at his residence in Charlottesville, Virginia, on the 27th day of May, 1898.

It is now many years since Randolph of Roanoke's memorable greeting to Philip Pendleton Barbour; and the soil of the Piedmont hills is still red. What further strain of greatness may yet linger there, it is given to no man to prophesy. But of all the mighty dead whose feet once trod them, or who sleep in peace with upturned faces under the red hills, there is none whom his own day and generation more acclaimed as wise and good and great than William Joseph Robertson.

GEORGE VAN NESS LOTHROP.

GEORGE VAN NESS LOTHROP

From a photograph by Bergasnadeo of St. Petersburg, Russia, taken
when Mr. Lothrop was Minister to Russia.



GEORGE VAN NESS LOTHROP.

1817-1897.

BY

CHARLES ARTEMAS KENT,

of the Michigan Bar.

THE Lothrop family derives its name from Lowthorpe, a small parish in the County of York, England. The earliest records show, that in 1216 Walter De Lowthorpe was chosen sheriff of Yorkshire. Members of the family continued to reside in that county until after the ancestors of the American Lothrops emigrated. Persons of the same name reside in other English counties. The name is spelled in various ways. The Lothrops and Lathrops of this country are of the same family. The first person of this name to come to America was the Reverend John Lothrop, a minister of the English Church, who became an Independent, and was driven by persecution to leave England. He came to Scituate, Massachusetts, in September, 1634. From him are descended the most of the Lothrops and Lathrops now in this country.

George V. N. Lothrop was not descended from the Reverend John. His ancestor was Mark Loth-

rop, who came to Salem, Massachusetts, in 1643. The connection between these two pioneer Lothrops has not been traced. In 1656 Mark Lothrop was living in Bridgewater, Massachusetts, one of the proprietors of the town. He was active in town and church matters, and prominent for about twenty-five years. The inventory of his estate is preserved, and shows him to have been a man of considerable means for the times. The descendants of Mark continued to reside in eastern Massachusetts, and for the most part in Bridgewater and Easton. They were probably well-to-do farmers, having generally no special prominence.

Howard Lothrop, the father of the subject of this sketch, was of the sixth generation from Mark. He was born in Easton, December 17th, 1776, and died August 23d, 1857. His portrait, preserved in the Lothrop family history, shows a man of marked force of character. When quite a young man he went to Pittsford, Vermont, where he invested in a furnace, became its superintendent, and finally its sole owner. While in Vermont, he became a friend of Cornelius P. Van Ness, then a lawyer of Burlington, Vermont. Mr. Van Ness was chief-justice of the Supreme Court of the state in 1821 and 1822, and governor from 1823 to 1826. He was then a National Republican, or Whig, but having been defeated in a contest for the United States senatorship in 1826, he joined the Jackson party, and was sent as envoy to Spain by Jackson.

Howard Lothrop returned to Easton in 1809, and spent the remainder of his life on the homestead which had been his father's. He had a farm of one hundred and twenty acres, rough and rolling, with fences of stone walls. But farming was not his chief occupation. He had a large local influence, and was for many years a member of the state legislature, senate and house. In 1836 he was a Presidential elector, and as such, cast his vote for Daniel Webster. He was in politics a Federalist and Whig, and in religion an orthodox Congregationalist. He had only a common school education. His brother Cyrus was a graduate of Brown University and of the Lichfield Law School, and for many years, an honored member of the Bristol County bar.

Howard Lothrop and his wife Sally, daughter of Edward Williams of Easton, had one daughter and nine sons. The daughter, Sarah, married the Honorable Oliver Ames, Jr. He was an eminent manufacturer, and one of the builders of the Union Pacific Railroad, and for a time was president of the company. Several of the sons of Howard died young, but all of those who lived to mature life, appear to have been successful in business, and highly respected in the communities where they resided.

The eldest, Edwin Howard, was born in 1806, and graduated at Amherst College in 1828. In 1830, he removed to Michigan, then in its interior almost

a wilderness, known chiefly to hunters and occupied by the scanty remnants of the Pottawottomies. He went on horse-back west from Ann Arbor, through a country having almost no roads or settlements, guided principally by Indian trails. Reaching the beautiful Prairie Ronde in Kalamazoo county, he found a few settlers and concluded to remain. He bought a tract of land and made it into a farm. His first residence was a log cabin. To the work of a farmer, he added the purchase of oxen, cows and sheep in Illinois, Indiana, and Ohio, and their sale to the immigrants then rapidly coming into the state. He was interested in public life. Though a Democrat where the majority were Whigs, he was a representative in the state legislature in 1836, 1837, 1842, 1843, 1844 and 1848. He was speaker of the House in 1844. He delivered the address to the State Agricultural Society when it was first formed. In 1855 he removed to Three Rivers, where he died in 1874, universally regretted.

George Van Ness Lothrop was born at Easton, August 8th, 1817. He was named Van Ness after his father's friend, the governor of Vermont, before mentioned. He was not fond of farm work, but early showed a great love for books. He was a strong boy. Until fourteen, he attended the common schools. He prepared for college at Day's Academy, Wrentham, Massachusetts. I have been able to ascertain nothing of his life in the common schools or academy. He entered the Freshman class

of Amherst College in 1833, but for some reason now forgotten, left there and went to Brown, where he graduated in 1838, with distinction, in a class long remembered for its general excellence. Among his classmates were Charles S. Bradley, a distinguished lawyer, and at one time Chief-Justice of Rhode Island, Mr. Robinson, afterwards President of Brown, Marcus Morton, son of Governor Morton, and Thomas A. Jenckes, who became a distinguished lawyer and congressman, and was noted for his early advocacy of Civil Service Reform.

Mr. Bradley and Mr. Lothrop were intimate friends in college and their friendship continued through life. Each named one of his sons after the other. In college, they were both greatly distinguished as public speakers and debaters, and their reputation for superiority as such, continued for many years among later classes. Dr. Wayland was at that time president of the college. At Brown, Mr. Lothrop was a member of the Alpha Nu Fraternity. In the fall of 1838, he entered Harvard Law School, intending to complete the legal course, but in consequence of the failure of his health, he was compelled to leave near the end of the first year. At the law school his teachers were the eminent Justice Story of the United States Supreme Court, and Professor Greenleaf, remembered for his standard work on Evidence.

Mr. Lothrop's name appears in the Harvard Law Catalogue, in the class of 1839. Among his class-

mates were William M. Evarts, and Ebenezer R. Hoar. Soon after leaving the law school, Mr. Lothrop went to his elder brother's home in Michigan. He was there on his brother's farm for between three and four years. During this time, he made a number of long journeys on horseback, through the south and west, buying cattle and horses. Once he drove a flock of sheep to Detroit. In this way he completely reestablished his health and thereafter had no serious sickness until the last.

During this time, he made public addresses. Once at Schoolcraft, he discussed the abolition of capital punishment for murder. In 1840 he spoke in favor of the election of Martin Van Buren. Then, as always, he was thought an able and eloquent speaker.

Michigan was then in a very undeveloped condition. The population was about 175,000 scattered through the southern part of the state. The people were still suffering from the great panic of 1837.

Mr. Lothrop remained with his brother until March, 1843. He then removed to Detroit, and entered the law office of Joy & Porter. Mr. Joy was at this time, though a young man, one of the leading lawyers of the state, and he continued such until drawn from the profession into the construction and management of several railroads. The acquaintance thus began, between Mr. Joy and Mr. Lothrop, continued through life, to the mutual satisfaction and profit of both. When Mr. Lothrop returned from

Russia in 1888, Mr. Joy in a letter to the public press, welcomed him home, recited their early and continued friendship, and expressed a very high opinion of his merits.

At this time there were a number of lawyers in Detroit who attained eminence. Among them besides Mr. Joy, were Jacob M. Howard, William A. Howard, Elon Farnsworth, George C. Bates, Alexander W. Buel, Samuel T. Douglass, Henry N. Walker, Halmer H. Emmons, James V. Campbell, James A. Van Dyke. Between 1850 and 1860, there came also, Charles I. Walker, Alfred Russell, and Ashley Pond, equally distinguished with their predecessors.

During the whole period of Mr. Lothrop's practice, he had as his competitors many lawyers of great ability, learning and high character. The bar of the city and state during this time, was probably not inferior to that of any city and state of equal population.

While Mr. Lothrop was a student, he was asked by Mr. Joy to examine an important case, the Michigan State Bank vs. Hastings,¹ and Mr. Joy was so impressed with his suggestions, that leave was sought and obtained of the Supreme Court, for Mr. Lothrop to argue the case, before his admission to the bar. His argument so impressed the judges, that they complimented him thereon. It is said that this was his only admission to the bar of the State Common Law

¹ 1 Douglass' Reports, 225.

Courts. He was admitted to practice in the Federal Courts of the state in 1844.

The same year, he entered into partnership with D. Bethune Duffield, one of the sons of the Reverend George Duffield, then an eminent Presbyterian minister of Detroit. Mr. Duffield was not only a good lawyer, but a man of literary culture and a poet. This partnership continued until 1856. Thereafter Mr. Lothrop had no partner. He continued in practice until 1885, when he became United States Minister to Russia. He never resumed practice after his return from Russia.

On January 8th, 1884, he addressed the Supreme Court of Michigan, on the occasion of the presentation of complimentary resolutions by the bar on the retirement of Chief-Justice Graves. In that address he said: ²

If I may add a word personal to myself, I wish to say that it has been my happiness to know personally every judge who has ever sat in the Supreme Court of Michigan. To the larger part of the living bar, the names of many of the earlier judges are only historical names. To me they are the names of personal friends. And, as I stand here, I recall with emotion that it is just forty years, at this term, since I first essayed to speak in the Supreme Court of Michigan, and that here a large part of the humble labor of my life has been done.

Mr. Lothrop's name first appears in the Michigan Reports in the second volume of Douglass' Reports in January, 1845; it last appears in 1884, in the 55th

² 51 Michigan Reports, xxi.

of the Michigan Reports. His first cases in the Supreme Court involved very small amounts, and he was not successful. From 1844 onwards, his name appears often in the reports of the United States Circuit and District Courts, sitting in Michigan, and especially in Admiralty cases.

In 1848, he was appointed by Governor Barry, Attorney-General of the state of Michigan, and he retained this office until January 1st, 1851. Here he had an opportunity of showing his power and he rapidly attained distinction, and a large practice, private as well as that pertaining to his office. It is probable that from this time, until his retirement, no lawyer in Michigan had more numerous or more important cases. The variety of his practice was very great. He appeared in every court in the city of Detroit, and in many courts held in other parts of the state. It is said that in the height of his business, he did not disdain to go into the lower courts when requested. For reasons which are hard for a lawyer to understand, he refused to be employed in any case pending in the United States Supreme Court. He never appeared in that court, though many of his cases went there. When they did, other counsel had to be employed. I find no account of his reasons for this singular course.

He was general counsel for the Michigan Central Railroad Company for twenty-five years, and was employed at different times by many, and perhaps all of the railroad companies whose lines came to De-

troit; he was also retained by many other corporations. Mr. Lothrop tried many important admiralty cases, was engaged in many criminal cases, and defended several persons charged with murder.

Perhaps no case of Mr. Lothrop's ever attracted more public interest than the trial of a young man named Farman, for the murder of John Ward, a son of E. B. Ward, the leading business man of the city at the time. The case was tried in November, 1867, in the Criminal Court of the city. The presiding judge was Charles I. Walker, a very eminent lawyer. The prosecution was conducted by Jacob M. Howard, then a United States Senator, a lawyer who, when aroused to his greatest efforts, was not inferior in the discussion of questions of law or of fact, to any one who has resided in Michigan. There was no question of the killing, but the defense was, that it was justified because, as was alleged, the deceased had seduced the sister of the defendant. The arguments of both Senator Howard and Mr. Lothrop were very able and received universal admiration. It is not probable, that the city has since seen an equal display of forensic eloquence.

One incident in the trial illustrated Mr. Lothrop's independence of character. The prisoner was permitted to make his statement under a statute authorizing such statement, but providing, that in such case he might be cross-examined on the statement. The prosecution sought to cross-examine the prisoner. Mr. Lothrop directed him not to answer certain

questions asked. Under this advice the prisoner refused to answer. The court held, that the questions were proper and directed an answer. The witness still refused. After the trial was finished, the court recognizing the sincerity of Mr. Lothrop's opinion, that the prisoner ought not to be compelled to answer, but thinking the questions so important, that a final adjudication by the Supreme Court should be had, imposed a nominal fine on Mr. Lothrop with the expectation that he would take the case to the Supreme Court. He refused to do this and paid his fine. He afterwards defended himself in the newspapers in a letter, which showed that his feelings had been much hurt.

Important and numerous as were Mr. Lothrop's cases in the Supreme Court of the state, it is a difficult task to point out his influence in molding the law of the state. The great changes in the law of Michigan have been the same as those in many other states, and have been produced by like waves of public opinion. It is hard to point out many judicial decisions which have effected important changes in the law. It is harder still to ascertain the influence of any lawyer in such changes. Accustomed as lawyers generally are, to be retained by any one who chooses to employ them, they are not likely to present uniform views on the same subjects when they arise in different cases. The necessity which every lawyer is under of making the interests of his client paramount in each case, may

lead to the expression of different views at different times.

The briefs of counsel are most imperfectly given in the reports. Often Mr. Lothrop was associated with other counsel on the same side, and the brief may be a joint one, or it is impossible to tell who wrote it. It is impossible therefore to measure his influence on the law with any precision. And doubtless the same remark is true of every other lawyer in the state. Nevertheless a few instances may be given when Mr. Lothrop did something to mold the law.

In 1861, he drew a statute which was passed by the Legislature and became a law, by which, many technical defects in conveyances were made immaterial, and by which the record of such conveyances became noticeable to the world. This statute has been of great value in securing titles equitably valid, but under previous decisions, insecure. It has done much to prevent fraudulent purchasers from claiming ignorance of equitable titles recorded, though under previous laws not entitled to record.

In *Michigan Central Railroad Company vs. Hale*,³ Mr. Lothrop gained a decision of much value to the company. The court held, overruling a former decision, that under the provisions of its charter, the railroad company is not liable as a common carrier, but only as a warehouseman, for goods which have been transported, and are awaiting delivery to

³ 6 Michigan Reports, 243.

the consignee. In *People vs. Auditor-General*,⁴ he successfully maintained that the lands conveyed to the contractors for building the St. Mary's Falls Ship Canal, were exempt from taxation for five years, from the time fixed for the completion of the canal unless previously sold. A large amount of very valuable lands were involved in this question. In *Twitchell vs. Blodgett*,⁵ Mr. Lothrop was successful in advocating the invalidity of a statute by which the votes of soldiers in the field were authorized to be taken. This case attracted much public interest. In *Ryerson vs. Utley*,⁶ he succeeded in maintaining the unconstitutionality of a statute, which authorized a contractor, who had done work for the improvement of Muskegon river, to collect tolls. It was held, that such collection is forbidden by the constitutional provision, that the state shall not engage in works of internal improvement.

In *People vs. Salem*,⁷ and in *Bay City vs. State Treasurer*,⁸ he argued successfully, that under the constitution of Michigan, all laws authorizing municipalities to aid in the building of railroads, are invalid. The case attracted a great deal of attention at the time in the state, and in neighboring states. About \$1,500,000.00 of bonds had been issued by municipalities in Michigan, based on statutes held

⁴ 7 Michigan Reports, 84.

⁵ 13 Michigan Reports, 127.

⁶ 16 Michigan Reports, 269.

⁷ 20 Michigan Reports, 452.

⁸ 23 Michigan Reports, 499.

void by this decision. The bond-holders ultimately recovered their money, through the United States Courts, the Supreme Court of the United States having refused to follow the Michigan decision as far as it effected bonds in the hands of holders, who had paid for them prior to the decision of Supreme Court of the state. The decision has not been followed in other states, but it has been approved by subsequent decisions in Michigan, and is to-day the law of that state. It has been of great use in checking the tendency of municipalities to run in debt for railroads, or other public improvements.

For many years Mr. Lothrop was generally called the leader of the bar in the state. His success and reputation were founded on his merits, and not at all on self advertisement or pushing for business. He was a modest man, not given to self-praise. He was a learned lawyer and could, when he deemed it necessary, make a brief discussing fully the authorities and principles bearing on any case, but in this respect he was perhaps not superior to several of his competitors. In a marked degree he had that uncommon quality, excellent common sense, the power to judge correctly and rapidly, men and circumstances. He had no bad habits, nor habits which though respectable, waste one's power. He never smoked. Though no teetotaler, he never habitually used intoxicating liquors, not even wine or beer. He had an extraordinary love of work, and power to work rapidly and easily, caring very little for

assistance from subordinates. He did not hesitate at any work connected with the business in which he was engaged, even being known to copy in his own hand the pleadings in a case, and personally make service on the opposing counsel. His handwriting was quite peculiar, but regular and very legible.

Mr. Lothrop was about six feet in height, neither spare nor fleshy, of a very dignified appearance, courteous and affable, but not familiar with everybody. He was a natural orator, having a fine voice and a ready command of choice language. Though of a sufficiently emotional nature to understand the feelings of juries and of men in public assemblies, he ordinarily aimed to convince their judgments, rather than excite their sympathies, never making any of those maudlin appeals to pity for his clients, sometimes so effective with weak juries, but always so disgusting to men of good sense.

One of his greatest distinctions was the readiness with which during a jury trial, he could follow and remember the evidence, see the weak points of his opponent's case, and the strong points of his own. During a trial he was always perfectly self-possessed, courteous to the court and to the opposing counsel, and with a mind alert to follow every development of the case and calculate its effect on court and jury. He cross-examined with discretion, never irritating a witness unnecessarily, never pursuing an inquiry where there was no reasonable expectation of aiding his client thereby. He could make a plausible ad-

dress to the jury in almost any case. He could become eloquent whenever there was any occasion for eloquence, even in cases of little importance. His jury arguments always commanded the attention of even casual spectators. If he had a good case, he never failed to see and make the most of it. If he had a poor case, he did not try to deceive the jury by misstatements of fact, or by appeals to unworthy passions. In the trial of almost every kind of a case, he was probably the most effective jury advocate Detroit has seen, but neither he nor any other man I have known could win a verdict in a doubtful case against the strong sympathies of a jury.

In legal arguments Mr. Lothrop had the same quickness of apprehension and fertility of resource which he displayed in jury trials. He was employed a great deal as counsel for other attorneys in jury trials, and in arguments before the courts. I think there would be a general agreement, that his greatest assistance as such counsel was not in consultation, but in the hearing of cases. Back of all of his arguments to court and jury, and adding great weight to them, was a reputation for sincerity and the highest integrity.

Once or twice for political purposes his integrity was assailed, but the assaults were indignantly repelled by men of both political parties, and by the general public in Detroit. He was President of the Detroit Bar Association from 1879 to 1896. He declined reelection.

High as was Mr. Lothrop's position at the bar, and successful as he was in practice, he was remarkable for the moderation of his legal charges. Complaint was often made on this account by his brethren of the bar. This moderation appears to have come from an under estimation of his services, and not from any indifference to the value of money.

Parallel with Mr. Lothrop's life as a lawyer, and equally eminent, was his life as a political leader. In the year when he came to Michigan, 1839, the Whigs elected their governor and both United States Senators, and in 1840, the vote of the state was for Harrison. In 1841 there was a reaction and thenceforth the state was Democratic until 1854, when the Republican party was formed. Though Mr. Lothrop's father and grandfather were prominent Federalists and Whigs in Massachusetts, somehow and somewhere, it does not appear when or where, the politics of the son changed. In Michigan he was always a Democrat. His course may have been influenced by his brother Edwin. I have not found any early expression of the grounds of his Democracy, but in 1871 at a celebration of the anniversary of the battle of New Orleans, he spoke of the meaning of Democracy as a political doctrine. He traces it to the cabin of the Mayflower, where a state was founded on the pure Democratic idea of just and equal laws, emanating directly from the governed. He makes much of local government, as against a highly centralized general government:

In Thomas Jefferson, Democratic thought and opinion found its first great leader in this country. Under him it took possession of the national government and held it with little interruption for half a century.

Against this Democracy, the Federal, Whig and Republican parties appear to him as aristocratic, undemocratic, always tending to the centralization of power. He thought the Democratic party lost power through the slavery question. It wished to leave it, where the Constitution left it, as a domestic institution. The Republican party gained power by seizing on the slavery question, and making it a national firebrand. During the war which ensued, it overrode the Constitution, suspended the writ of *habeas corpus*, tried civilians by military commissions, in states, where there had never been rebellion, and where the civil courts were open, overawed elections by armed troops, framed tariffs in the interest of monopolies, heaped taxes on taxes, created a devouring swarm of office holders, inquisitors and spies.

He says:

In order that the Democratic party may return to power, we must show, that we seek power not for offices and rewards but that the Government shall be made truly democratic. We must show that we intend, that the Federal government shall be stripped of its usurped power; that domestic affairs shall be restored to the legitimate control of the states; that military power shall be strictly subordinate to the civil power; that strict economy shall prevail; that needless offices shall be abolished; that the many shall no longer be plundered for the benefit of the few by iniquitous tariffs, and that in one word, we are determined to

have again, so far as possible, the cheap, simple, equal and democratic system of government, which Jefferson founded, and Jackson maintained.

These quotations do not show anything peculiar in Mr. Lothrop's political views, but they show his complete sympathy with the better leaders, and more moral forces of his party, and hence his fitness to be a worthy leader.

Mr. Lothrop believed in the Democracy, as sincerely and earnestly as any Republican of the past has believed in the inestimable benefits which that party has conferred on the country. He was not a political philosopher, seeing with impartial eye the terrific forces in conflict, and the inevitable necessity which compels the party in power during a great civil war to do many illegal acts. If he had been, he could never have been a great political leader, or probably even a great advocate at the bar. The political leader and the advocate must be in sympathy with those whom they address.

Though Mr. Lothrop was an earnest Democrat, he rejected his party ticket, local and national, when the public good appeared to make this necessary. An early instance of this was in 1852, when a controversy arose over the appropriation of the public money to sectarian schools. The regular nominees of the Democratic party for municipal offices were thought to favor such appropriation. Mr. Lothrop very earnestly opposed it and was elected Recorder on a citizens' ticket. This was then an inferior ju-

dicial office. Again in 1866, when the jurisdiction of the Recorder's Court had been much extended, Mr. Lothrop thought the Democratic nominee unfit for the place, and he earnestly and successfully advocated the election of a citizens' candidate.

In 1856, Mr. Lothrop was the Democratic candidate for Congress. This was the year of the heated triangular conflict for the Presidency between Buchanan, Fremont and Fillmore. The Republican party then newly-formed, was based on opposition to the repeal of the Missouri compromise, and the opening of new territories to slavery. The struggles which had been going on in Kansas between the free state men, and the advocates of slavery added much fuel to the flame of anti-slavery sentiment. Mr. Lothrop canvassed his district, and doubtless made many speeches, but I have found none preserved, nor do I know what special views he advocated, but suppose he must have agreed with his party, and favored squatter sovereignty. His successful opponent was William A. Howard, a man of marked ability, who achieved a national reputation as one of a committee of Congress, which investigated the Kansas troubles.

In 1860 Mr. Lothrop was again the Democratic candidate for Congress, and was again defeated by his Republican competitor. The same year he was a delegate to the Democratic National Convention, where he was the leader of the Michigan delegation and earnestly supported Mr. Douglas. He made

many speeches in this campaign. He must have favored the leaving of the question of slavery to the people of the territories. One great argument constantly enforced by the Democrats was, that Lincoln's success meant secession and war, a prediction which turned out too true. Mr. Lothrop's defeat in these campaigns did not arise out of any lack of personal popularity. The issues were such as to dwarf all questions of the men to be chosen.

When the secession he had anticipated came, Mr. Lothrop ranged himself most earnestly on the side of the Government. Immediately after the attack on Sumter, he made an address in a public meeting, called without regard to party, to support the administration in crushing the rebellion. He then said he was for the country whether in the past it had been "right or wrong." He even then anticipated the seriousness of the issue, and expected that the contest would be a long one. After the first defeat at Bull Run, he made another public speech, much longer than the first, and most unequivocal in its condemnation of the Confederates. A few extracts from this speech will show its tenor.

The question at once arises, why this attempted secession? But that question, I neither propose to put or answer here to-day. This is not the time for it. I have no doubt, but that some wrongs, some grievances, some provocations have existed, as such great movements do not take place wholly without cause. But we see and know, that there was nothing to justify secession and plunging the country into civil war. . . . To-day I have other questions to consider. They are these: Where do we

stand? What is our duty? And I am glad that on these topics I can speak to you to-day, for after experience of six months, what I say, will be better understood, than when this terrible strife began. At the outset, many supposed, this outbreak would be transient, easily suppressed. I was not of that number. From the first, I thought it was to be a death struggle. Hence, though from the first, after the attack on Sumter, I accepted this war as an absolute necessity, I accepted it with inexpressible agony. I foresaw its long train of suffering, misery and disorder. And where do we now stand? We all now know that we are plunged in a horrible civil war. We all now know, that it is a war to be waged to the extremity. . . . We have learned what secession is. We know now that it is civil war. We know that it imports a destruction of all the state governments. For it is an idea absolutely inconsistent with permanent government. . . .

Now what is to be done? I speak in the full face of all our disaster, and I say *this war must go on*. . . . I think no man who is loyal to government, or even to himself, can to-day talk of compromise. Why to propose compromise to rebels in arms is to recognize secession. To treat with an armed enemy is to accept his position. And hence, it is to accept secession. We have but one duty, and that is to stand by the Government, and put all compromises behind us. My next reason is that we have got to *redeem our honor*. To-day we stand dishonored and disgraced in the face of Christendom. There really can be no nation without a character for personal prowess.

During the whole secession war, Mr. Lothrop adhered most earnestly to the view, that the war must go on until successful, but he disagreed as earnestly from many acts of the Government. He was very much opposed to making government notes legal tender, and wrote a letter to the Detroit Free Press urging with much force, that only so much paper,

intended to pass as money, should be issued as could be kept redeemable in coin, and that all other government indebtedness should be put in the form of securities bearing interest. If this view had been adopted, no doubt, it would have saved the enormous increase of expenditure caused by an inflated currency. But whether or not it could have been, perhaps only those in charge of the national treasury, like Secretary Chase, were competent to decide. Mr. Chase then thought the issue of legal tender notes, absolutely necessary, though afterwards, as one of the justices of the Supreme Court he held the legal tender part invalid.

In 1862 Mr. Lothrop wrote to the Detroit Free Press commending the action of the Young Men's Society of Detroit, in refusing their hall for the use of Wendell Phillips. He looked on the latter as standing at the opposite pole from Yancey, and equally with him a traitor to the Constitution.

He says of Phillips:

He is a life traitor. He glories in a life dedicated to the overthrow of the Constitution. There is but one other man, who has labored so long, so persistently and ceaselessly to destroy the Union. And among the conscious and responsible agents of our present sectional hate and war, neither Yancey nor Davis, can dispute the bad preëminence with him. . . . He hailed with rapture the flagitious attempt of John Brown. He bore his body to its grave and entombed it with the honors of a martyr.

Mr. Lothrop then says:

John Brown's raid was the highest crime ever committed against social order in this country, anterior to the rebellion.

In 1863 Mr. Lothrop participated in a public meeting called to express indignation at the arbitrary arrest and trial by court-martial of Vollandigham. He made a very able speech on the occasion, one which to a lawyer, is conclusive against the validity of the trial. At the same time he disclaimed all sympathy with Vollandigham's views. Perhaps he did not realize how powerless in a great civil war, when people feel that the existence of the Nation is at stake, is any appeal to any law, constitutional or otherwise, against vigorous and necessary executive action; how impossible in such crisis is any freedom of speech to oppose the opinions of a great majority. During the rebellion there was no freedom of speech in the minority north or south, to express hostility to the prevailing view in political matters. And during our Revolutionary War the Tories enjoyed just as little freedom.

In April, 1864, in view of the coming Presidential election, Mr. Lothrop wrote a letter to the Free Press, in which he expressed his opinion of the Republican party, and the course the Democrats should take in order to gain power. He says:

The condition of the country is deplorable. Its motion towards the brink of bankruptcy seems to accelerate every hour. An overgrown army inactive in camp, or inglorious in the field, devours the substance of labor and industry. Corruption and profligacy supplant all public virtue. Councils at once fanatical and feeble fail to vindicate constitutional liberty; or to repress the notorious frauds and peculations of contractors and officials. And lastly, the whole industry of the country is imperiled by a bloated

paper currency, inaugurated at once in violation of the Constitution and the immutable laws of political economy. And what is worst of all, this false and dangerous system of paper money has by a vaunted national banking system, been actually placed beyond the control of the Government. . . . With all its corruptions, usurpations, abuses and mischievous doctrines and policies, the Republican party is believed heartily and inflexibly hostile to the rebellion. Its war-cry, "The rebellion shall be destroyed," is real and sincere. "This is the secret of its strength." The trouble with the Democratic party is an unfounded distrust of its patriotism. This distrust must be removed. There must be no toleration of armed rebellion. Slavery is dead through the war. President Lincoln's proclamation seems to me both unconstitutional and ineffectual. . . . But slavery is not dying of proclamations and such "bulls to the comet." It is falling by war. Slavery in fact dissolves in the path of the Union armies.

In September of the same year Mr. Lothrop wrote another letter to the *Free Press*, earnestly supporting the candidacy of General McClellan for the Presidency. He says:

After the alarming experience of the last three years, during which the liberty of the citizens has hung on the touch of a bell at the right hand of the Premier, the country will hail the accession of a President, who recognizes the limitations of the executive power in the Constitution of the United States, and the laws formed in accordance therewith.

In 1867, a communication from Mr. Lothrop was published in the *Free Press*, showing in criticism of certain resolutions adopted by the Board of Trade of Detroit, the evils of an irredeemable paper currency, and of a high tariff. He illustrates his position by examples from the history of England. He

says: "Our only safety is to return to a sound currency; one standing at that level, which the interchanges of the world require, to reduce as far as possible, all burthens whether of duties or excise, levying the necessary revenues of government as far as possible on articles of luxury. . . . Specie is the only standard. . . . Bank issues afford a cheap and convenient business currency. Still these issues are not money. They, however perform perfectly the functions of money, so long as they are equivalent to the standard that is convertible on demand into specie."

In 1868, Mr. Lothrop earnestly supported Horatio Seymour against General Grant and made campaign speeches.

I do not find any record of his support of Horace Greeley in 1872.

The Democratic candidate, Samuel J. Tilden, in 1876, was a personal friend of Mr. Lothrop, and was supported by him in effective public addresses. If Tilden had become President, it is probable that Mr. Lothrop would have had some position corresponding to his high character and his standing in the party, and in the state.

In 1880, Mr. Lothrop supported Hancock with his usual eloquence and full conviction that the best interests of the country demanded the success of the Democratic party.

A like support was given to Cleveland in 1884, and this time with the long-deferred success. For

many years Mr. Lothrop was regarded as the leader of the Democracy in the state. He was always on demand on all important occasions, when the representatives of the party met in Detroit. His speeches voiced the feelings of his hearers and his party, more than those of any one else. While he did not descend to personalities, he had a thorough conviction, that the hope of the country was in his party, and he could say with emphasis of the Republican party: "Turn the rascals out."

In 1881, he was the nominee of the Democrats in the state Legislature for United States Senator, but as the party was in the minority, there was no chance of success. At another time when the Republicans were divided, it was suggested to Mr. Lothrop, that if he would make certain promises, the bolting Republicans might be induced to unite with the Democrats and elect him. Of course he declined such a bargain.

It has often been said, that if Mr. Lothrop had been a Republican, or if the Democrats had been in power in the state, he would have been chosen United States Senator, and have gained a national reputation in political life. This may be true, but it is quite as likely that his uncompromising honesty and independence would have unfitted him to be the leader of a party in power. It is comparatively easy to be the virtuous head of a hopeless minority.

From 1863 to 1872, Mr. Lothrop served on the House of Correction Commission, and from 1880 to

1886, on the Public Library Commission. He was a member of the Constitutional Convention of 1867, and was appointed a member of the like convention in 1873, but declined to serve.

In 1884, after Cleveland's election, Mr. Lothrop met him in Buffalo. The President elect was so impressed with Mr. Lothrop's abilities and character, that in May, 1885, without solicitation, he was appointed Minister to Russia. This appointment gave universal satisfaction to men of all parties in Michigan, and wherever he was well known. Innumerable telegrams and letters of congratulation came to him. Commendatory articles appeared in a great number of Michigan papers, and in leading journals elsewhere. The Legislature of the state gave him a reception, at which, he made a most happy speech, recounting his early experiences in the state. There was a meeting of the Detroit Bar in his honor, at which complimentary memoranda were ordered to be entered on the records of the court. In response, he bade farewell to the members of the Bar and announced that his professional life was ended.

The Detroit Club gave, in his honor, a very large reception, which was attended by leading citizens of Detroit and of Michigan. Speeches were made by Dr. James B. Angell of the University of Michigan, Senator Thomas W. Palmer, Judge B. F. Graves and others. Mr. Lothrop responded happily as usual.

Mr. Lothrop returned from Russia in August,

1888, having resigned his position. Nothing of great importance occurred in the course of his duties as a minister. The usual questions arose as to the treatment by the Russian government, of Russians who had been naturalized in the United States and then returned to Russia, and also as to the treatment of Russian Jews naturalized in the United States who wished to travel in Russia. The Russian government denied the right to emigrate unless by special permission, and also the validity of the naturalization. It wished to exclude such Jews from Russia. There appears in the diplomatic correspondence, letters on both these subjects, written by Mr. Lothrop with his usual force and clearness, setting forth the American views. I am told on high authority that he was entirely acceptable to American citizens traveling in Russia, and to our government. Soon after his return he made a statement of his impressions, which was reported in the Detroit papers, and which shows his own view of his work, and its effect on his opinions. He says:

There is not much to be said of my mission beyond the sea. It has no very great merit. There was not very much, which was remarkable, to be done, nor was that little very remarkably done; but I may be permitted to say, without any feeling of vanity, that I have acted to the satisfaction, at least, to the approval, not only of my own government, but of the great government to which I was accredited. . . . I would gladly say something of that great country, and of the rulers of that great country. I say at once, that I have modified a great many of the opinions that I carried with me into Russia. I am either more enlightened, or

else more prejudiced. I remember a remark addressed to me by a lady who had a long time lived in the United States, Madam de Struve, the wife of the Russian minister at Washington. . . . After I had been in St. Petersburg three months, yes, it must have been four or five months, Madam de Struve returned to Russia, and the very first words addressed to me when I met her, were: "Do you find us all bears and wolves?" Now there is a wide impression, that Russia is a very rude, barbarous, uncivilized and unchristian country. We do ourselves as much injustice as we do them. Do not think for a moment, that I regard liberty as less a boon to mankind, as less a blessing, than I did when I left home. I regard it as the most infinite of blessings to mankind, but at the same time Russia is not abandoned to all the curses and anathemas of the human race. You might go to Russia, you might live there a great many years, looking upon society as you found it moving there, and you would not be impressed with the idea, that men who live there were deprived of all rights, of all liberties. Indeed, they are not. Ordinary society moves along exactly as you see it in the United States, men buying and selling, bargaining, marrying and giving in marriage, the same as they do here.

There is another side to it beyond any sort of doubt. The institutions of Russia we should not desire here. They would not be suited to us, but men must not believe for a single moment, that our institutions, invaluable as they are to us, priceless as they are, that our institutions here are as well adapted to them as their own. I may say emphatically, that the people are content with their government, not only the rich, but the poor, not only the nobles, but the peasantry.

When Kennan's articles on Russian prisons and prisoners were published in the *Century Magazine*, Mr. Lothrop thought that though the statements were true, they conveyed to the American public an exaggerated impression of conditions in that country,

and he wrote the *Detroit Journal*, November 3d, 1888, among other things:

The effect of Mr. Kennan's articles has been to give in America, a mistaken idea of the social condition of Russia. That idea is, that the people of Russia live in a wretched condition of fear, cowering and cringing under a cold and cruel despotism, with fear lest they may at any time be seized and condemned to the horrors of Siberian exile. I do not suppose for a moment, that Mr. Kennan intends or wishes to convey any such meaning. . . . But that they do convey a false idea, I know from the many inquiries made of me. The Russian political system, as I suppose every one knows, is in theory an absolute autocracy, but at the same time, in fact in all affairs and business, not political or military, the government is one of written law. The conduct, relations and dealing of man with man, are limited and regulated by positive law, and the aspect of civil society is, in the main, the same that may be found in the other countries of Europe. Russian civil society is no more oppressed with fears of Siberian exile, than is society in New York, with fears of Sing Sing.

Mr. Lothrop further says:

That in criticizing our neighbors, we should not forget the evils which exist in prisons in this country.

After he returned from Europe, he ceased to take a public interest in political affairs. No doubt he earnestly supported Cleveland in the campaigns of 1888 and 1892, but he made no speeches, wrote no letters which I have found. In 1896, he felt that the Democratic party had abandoned the principles which made it dear to him, and he supported McKinley.

Mr. Lothrop was often called on to make public addresses of a non-political and non-legal character.

In 1861 he made the annual oration at the State Fair. The same year he gave an address of welcome to Colonel Mulligan, who had greatly distinguished himself in the defense of Lexington, Missouri.

At the celebration in Detroit of the tricentenary of Shakespeare in April, 1864, he spoke on "Shakespeare and the Law." He proved by numerous citations from his dramas, that somehow Shakespeare had learned not the general principles of the law, but some of its most abstruse and technical doctrines, and that he used this knowledge not to commend, but to ridicule law and lawyers.

February 22d, 1865, he made an elaborate address at the celebration of the opening of the Board of Trade Building in Detroit. He first gave a clear but brief resumé of the history of Detroit from its foundation. He then discussed the nature of commerce; its necessity for the development of industry; the relations of labor and capital; the civilizing power of commerce; the dependence of commerce on the law; its relation to freedom; its dependence on the prosperity of the nations with whom trade is developed; and finally the absolute necessity of a sound financial system. This address was very able and especially adapted to the public needs of the time.

In 1871 he delivered an inspiring and instructive discourse at the annual Commencement of the Detroit Medical College. The same year he addressed the Society of the Army of the Cumberland, to the

toast "Our Disbanded Armies, the Citizens who were Soldiers and the Soldiers who were Citizens." He dwelt eloquently upon the rapidity with which our citizens became soldiers, when called by the country, and the ease with which the soldiers became citizens when the war was ended.

In 1878, he delivered an address at the annual Commencement of the University of Michigan, on "Education as a Public Duty." It was an eloquent and able plea for the duty of the state to maintain "not the common schools alone, but the university, and this teaching, not merely the old curriculum, but all useful secular science, calling, art, or industry." The doctrine was timely, and may have contributed to that greater liberality of the state to the university, which has prevailed in recent years.

His addresses contain historical and literary allusions, which show that he was well read in many departments of knowledge. For a man so busy, he was all his life a great reader. He had a well-selected rather than a very large library.

In 1873, his Alma Mater, Brown, honored itself by conferring on him the degree of Doctor of Laws. He was a man of excellent business judgment. Though his charges as a lawyer were low, and though not merely scrupulously honest, but considerate and indulgent in all his business dealings, his estate was inventoried at his death at over \$1,600,000.00. No doubt the fact that he came to Detroit early, and hence was able to make favorable investments, con-

tributed largely to this great success, but the basis of it was business judgment and careful economy.

He was interested in whatever concerned the prosperity of the city and state, and ready to aid every public improvement. He was interested in whatever concerned the prosperity of the city and state, and was ready to aid in every public improvement. As Park Commissioner he did much towards providing the city with a large city park. The first attempt failed, but finally Belle Isle, in the Detroit river, was secured and now constitutes one of the most unique and beautiful parks in the country.

He was never a member of any church. He attended with his family, at one time, Christ's Church, and on a change of residence, St. Paul's, both Episcopal Churches. Earlier in his business career, he was not a very regular church-goer, but after his return from Europe, his attendance was quite constant. Many of his speeches show a sincere belief and trust in God, and his last will, made some years before his death, begins thus:

The overwhelming affliction with which our Heavenly Father, in His all-wise providence, has permitted myself and my family to be visited in the recent death of my dear and affectionate son Charles, and my most dearly beloved and saintly wife, has seemed to make necessary some material changes in my testamentary dispositions; therefore in gratitude to Almighty God for the many and great blessings for many years bestowed on me and my family, and in humble submission to His divine will, I make and constitute these presents, as my last will and testament.

Those who knew Mr. Lothrop intimately, know that he was not free from doubts as to Christian doctrine which have perplexed many of the best men in our day, but his doubts came not from a heart unwilling to submit to the authority of Christ, but from an intellect compelled to look at all sides, and to feel the mystery of this unintelligible world.

Mr. Lothrop was very fortunate and happy in his domestic relations. He was married at Detroit, May 13th, 1847, to Almira Strong, a daughter of General Oliver Strong of Rochester, New York. Six children, four boys and two girls, grew to maturity.

After Mr. Lothrop returned from Russia, he spent his time chiefly in looking after his own business and in reading. He was one of the directors of the First National Bank, and a regular attendant at the meetings of the Board. He was also a very large stockholder in the great drug firm of Parke Davis & Co., and a wise adviser in its affairs. He still kept up an interest in legal matters and in 1889, was so impressed with the consequences of a decision of the Supreme Court of the state, with reference to the duration of corporations, under the state constitution and statutes, that he wrote a letter to one of our journals, calling attention to the decision and its probable results. Soon after this letter was published a movement was started by which the constitution and statutes of the state were changed, and corporations authorized to renew and continue

their existence after the expiration of their original limits.

About the time of his marriage, Mr. Lothrop bought a small farm in Grosse Pointe, on the shores of the beautiful Lake St. Clair. There the family spent its summers. They had also city homes, the last one situated on Fort Street. Mr. Lothrop enjoyed the out-door life given by his farm, with its fruit and its flowers. He was very hospitable, fond of children, and devoted to his family. He did not care much for travel. Once he went to California, but never to Europe, until he accepted the Russian mission.

His wife and two sons, both lawyers and men of great promise, died before him. These afflictions made him a broken-hearted man; and though he trusted in an all-wise Providence, his love of this life was gone. He gradually grew weaker in body, though preserving in a remarkable degree his mental faculties, until the extreme heat in July, 1897, overcame his powers of resistance. He died July 12th, of that year. Everywhere in the state of his long residence, by the action of the Courts, Bar meetings and the expressions of the public press, men recognized the fact that a great leader had fallen, a man distinguished as much for his wisdom and high moral character as for his intellectual strength and eloquence.

In compiling this brief record of the life of a great lawyer, I have been impressed with the fact,

often noticed by others, that the reputation of the greatest advocate is most transitory. His voice and presence cannot be reproduced. His speeches are seldom preserved. The questions discussed have ceased to interest. New questions and new men absorb the attention of the public.

Mr. Lothrop was an elevating influence at the bar of Michigan, and upon the people of the state, and this influence may continue to be propagated through successive generations, among those who have never heard his name. What other perpetuity of power on earth can any modest man expect?

WILLIAM MAXWELL EVARTS.

WILLIAM MAXWELL EVARTS.

1818-1901.

BY

SHERMAN EVARTS,

of the New York Bar.

WILLIAM MAXWELL EVARTS was born in Boston, February 6th, 1818, and died in New York City, February 28th, 1901. His span of life stretched over a period crowded with vast and important changes, in the history, in the manners and customs, and in the material growth of this country. At the time of his birth, the American Revolution was a living memory, not disturbed by the dispute of 1812; at the time of his death the Civil War had taken the place of the Revolution in the minds of his countrymen, not effaced from the memories of its participants, however softened and modified in its engendered bitterness of feeling it may have been, by the reuniting influences of our more recent troubles with Spain. In 1818 the union of the states was still waiting for the stamp and impress of nationality to be given it under the master-hand of Webster; in 1901 the United States, grown to the vast proportions which the wisest prophets of the early days had not foretold, with new burdens

and responsibilities newly-acquired, had launched upon her career as an important factor to be reckoned with in the future progress of the world. In this span of life the great questions growing out of this new experiment of government where the rights and interests of the several states were to be adjusted in conformity with, and not at the expense of, the vigor and strength of the Nation's government were settled. The great compromise of our Constitution inherent in the situation, fastened more securely upon our institutions by further compromise in 1820, settled as some sanguine people thought by still further compromise in 1850, was at last cut away from the body politic by the sharp sword of war. The wounds thus inflicted finally healed under and in spite of the slow and retarding process of reconstruction as administered in the hands of inexperienced surgeons in this new and complicated case. New and grave questions under our Constitution arose under this new and grave situation. The dual nature of our political framework brought out questions in time of war which could not be settled by the precedents of peace. When peace came the battles of the forum succeeded to those of armies. No less unhappy for the country was the political situation of the conquerors than the material destitution of the conquered. The loss of their great political leader throwing the reins of the executive branch of the Government into the hands of a man so far inferior as his successor proved to be, brought about that im-

passioned contest between the legislative and executive branches which resulted in the impeachment and trial of a President. International questions had also thrust themselves upon us and the world saw two great and powerful nations submitting to the peaceful decision of law, their great dispute, in the ever memorable Arbitration at Geneva. Reconstruction in all its outward forms completed, the people were again confronted with a new situation which had not been provided for in the ordinary machinery of their government. The contest of the two great political parties for the Presidency in 1876 demanded new methods and machinery under the Constitution for its peaceful termination, and once again our system of popular government was vindicated in the acceptance by the people of the final solution of the crisis in the Electoral Commission and its decision. Under the benevolent dispensation of time and the natural progress of a progressive people the country soon found under new issues the administration of the Government in the party which had been so long in opposition. The natural and ordinary influences of party government were regaining their equilibrium, until finally at the end of his life, without stopping to settle the disturbances within itself, the country reached forward and outward, partly by force of circumstances, to a broader field with a result that is still in the balance.

The social evolution in this country, its material growth and its expansion of population and territory

during the same period are marked by as great contrasts as its political history.

The profession and practice of the law has not escaped the influences and necessities of the times, and the changes that have come about need not be lamented if one takes the broad and enlightened view of the general progress of men's affairs. When one considers the career of a man whose life covers so eventful a period and the working part of whose life of more than fifty years was actively and prominently employed in many of the most important events which mark this stretch of time, either as a public-spirited private citizen, as a lawyer coming to the head of the profession and occupying that position for many years, or as a public man holding important public office, one cannot but feel that, when the career is ended, we have lost a great link in the chain which binds us to all that is best in the past.

Mr. Evarts traced his lineage on both his father's and his mother's side to the earliest settlers of New England from the mother country. His grandfather, James Evarts, moved from Guilford, Connecticut, which had been the home of the family in this country, to Sunderland, Vermont. He, following the calling of his ancestors, was a respectable, fairly well-to-do farmer. His wife, Sarah Todd, seems to have been rather his intellectual superior and joined with her love of books and reading that genuine piety to which the growing generation of men of that time owed so much to their mothers.

Jeremiah Evarts, the father of the subject of this sketch, was a most precocious child and his youth and early manhood were marked by extraordinary maturity of judgment and character. His short life was a noble and saintly one in which great intellectual powers were devoted with single-minded purpose wholly to the cause of the moral and religious elevation of his fellow men. Upon his graduation at Yale after much earnest and conscientious searching of his own heart and mind and with a deeply and honestly religious sense of the obligations of men, he studied for the law, and practiced his profession for four years in New Haven. In this he failed, not from lack of talents, or aptitude, or learning, or the neglect of their best use, but, in that he was not able to obtain sufficient business to support his small family. An incident of this part of his career is told by his biographer as characteristic of him and as indicating the cause which necessitated his abandonment of the profession. Under the law of Connecticut at the time the duties of a grand juror were those of a prosecuting official. His biographer relates that, a gentleman who was at that time a member of the New Haven bar gives the following account of the circumstances:

Mr. Evarts ever had too much unbending integrity to be a popular lawyer. He suffered not a little, and from some gentlemen of high standing in the profession, for his unyielding firmness. The circumstances respecting which you inquire arose from the faithful discharge of his duty as one of the Grand Jury for New Haven County, in the prosecution of some individual or

individuals for obvious violations of some law of the state that had *uniformly* been winked at by other persons in the same office. I do not now remember what the offense was; but it was one *contra bonos mores*—perhaps the violation of the Sabbath. Mr. Evarts said to me that his *oath* bound him to the prosecution; and he could not be governed by the corrupt usages of other men. He accordingly commenced a process but failed of convicting the offending party. He was opposed by the first lawyers of the state: and denounced and greatly and shamefully abused, by the community at large. He suffered for a long period on this account, and for righteousness' sake.

So completely had he brought his whole being into accordance with the purest and strictest law of righteousness in regard to official duty

“Nor number nor example with him wrought
To swerve from truth, or change his constant mind
Though single.”

In 1810, Jeremiah Evarts removed from New Haven to Charlestown, Massachusetts, at the same time severing his connection with the profession of the law, to take the editorship of “The Panoplist,” an influential orthodox Congregational paper devoted to the maintenance of the doctrines of that church against the growing influences of Unitarianism which had then begun to disturb the peace of the evangelical religious bodies of New England of that day. As editor of this paper and as Treasurer and Secretary of the Board of Commissioners for Foreign Missions, the remainder of his life was devoted to philanthropic labors. By the universal testimony of his contemporaries he possessed a very acute and comprehensive mind, great knowledge of human

character, great charm of conversation, a perspicuous and forcible style of expression in his writings and public addresses, a devotional piety without cant, and a large view in his dealings with men and affairs which had all the elements of statesmanship.

In his labors in behalf of the rights of the Indians which were being despoiled and confiscated by the State of Georgia and the United States, he wrote a series of essays under the pseudonym of William Penn, which were widely read at the time and called forth from Chief-Justice Marshall the statement that "they presented the most conclusive argument he had ever read on any subject whatever." The subject was one calling for all the qualities of a learned lawyer, for its discussion and presentation.

At the age of fifty he died from the disease which, for years, had warned him of the shortness of his tenure of life and which to him made his obligation to labor more insistent. He died in an ecstasy of a sure and steadfast belief in the God to whose service his life had been consecrated.

On his mother's side William M. Evarts came by as great a heritage. Roger Sherman, his grandfather, was not least among the statesmen of the Revolutionary period. A stanch patriot and a man of great wisdom, he was conspicuous in his labors for the cause of American Liberty. On the Committees for drafting the Declaration of Independence and the Constitution he has alone the distinction of having signed the four great state papers, The Associa-

tion of 1774, The Declaration, The Articles of Confederation and the Constitution. His daughter Mehetable, the widow of Daniel Barnes, a West Indian merchant, married Jeremiah Evarts in 1804. Of her, when a little girl, this interesting anecdote is told and will bear repetition. Upon the visit of President Washington to her father she opened the door for him as he was leaving. Washington, putting his hand on her head, said, "You deserve a better office, my little lady." "Yes, sir," she replied, with a courtesy, "to let you in."

William Maxwell, who was named for the intimate friend and college classmate of his father, was the youngest of five children of this union. His father, who was at the time of his birth absent from home on one of his missionary journeys, records the event in his diary with this pious invocation:

I commend the babe to the merciful protection of Heaven; and pray that its soul may be saved in the day of the Lord Jesus, however it may please God to dispose of its temporal state.

We may picture to ourselves the childhood and boyhood of one with such antecedents spent in the Boston of that day. We hear much to-day of the "simple life" by way of contrast to the complexities of modern living. It is urged by some as a new discovery of to-day's philosophy, and assumed by others very much as a pastime to take the place of tennis or golf, when they have become wearisome. But at the time we speak of, it constituted the actual everyday life of the families that made up the best society

of Boston. It was not, to be sure, the "simple life" in which men might seek a refuge from the perplexities, the cares and problems of human society, or in which the intellectual life was placed in abeyance. It was the general order of the community, not perhaps by conscious choice, and largely, no doubt, the outcome of necessity. At all events, it was well adapted to the practice of the highest virtues and the cultivation of intellectual ideals.

Little that is particularly interesting, nothing that excites wonder can be told of the childhood and youth of the subject of this sketch. If feats of strange precocity were performed they were not recorded. "From the time that I was five years old, at the primary school," said he, in the course of an address delivered in Boston in 1870, "and then from seven to ten at the ward school, and then onward till I went to College, I was a school-boy of Boston." This final period of school life of which he speaks was spent at the famous Boston Latin School under the head-masterships of Leverett and Dillaway, and in a speech delivered at a dinner of the Boston Latin School Association in 1876, he thus describes his school life:

My life at school was a very happy one. I know nothing more regular, more scholarly, and in school days more completely limited to learning and reciting lessons. Four times a day, back and forth, I passed from School Street to Pinckney Street, varying the route a little by passing the Park Street corner of the Common or going around Beacon Street. Four times a day, every week day, accompanied almost always down or returning, by one

or more schoolmates; and as far as I recollect there was very little thought of influence over the scholars, behind that of instruction and discipline in learning. I cannot recall any influence upon the souls and morals that was exerted by the school, except by the association of ingenuous boys of good social position and influence at home.

The boy was not without distinction in his school, and at the age of ten was the recipient of a medal awarded for excellence in scholarship in the public schools. This award brought with it, under a custom then prevailing, the further distinction of being a guest, with other medal scholars, at a public dinner at Faneuil Hall. In an entertaining speech delivered on the occasion of the 250th Anniversary of the Settlement of Boston he makes humorous allusion to this episode in his early days.

Now, that dinner given to me—but if there were any other medal boy speaking to you he would say to *him*—was an important introduction to life to me, and if I have ever gained in my later life any credit for either eating or speaking at dinners, it has been owing to that early hospitality.

When ready for college his choice was quite naturally fixed on Yale. It was his father's college, his elder brother had been a student there, his grandfather had spent a long and honored career in the town of New Haven. Other influences may have had their share in this determination. They are thus spoken of by him in a half-humorous way, in another speech:—

I remember, when I was a boy, I traveled 240 miles by stage coach from Boston to New Haven to avoid going to Harvard

University, which was across the bridge. It was because of the religious animosities which pervaded the community, and, I suppose, animated my youthful breast.

At all events, in the fall of 1833 he entered as freshman in the class, for many years after its graduation known among Yale men as the "famous class of '37." It was a well-earned fame. While Mr. Waite sat on the Bench as chief-justice of the Supreme Court at Washington and Mr. Edwards Pierrepont was our Minister to England, Mr. Evarts was Secretary of State in the Cabinet of the President who had been successful in the great contest of 1876, against Mr. Tilden, who was also a member of that class, though not continuing through the college career. Yale had always been looked upon as a nursery of public men; of those who in the great arena of national affairs or in the more restricted environment of their own communities had stood as influential public leaders of opinion. But no previous class could count among its members so many men who figured so eminently in great affairs. Nor did these four men give all the fame in which the class had a just pride. In the more secluded paths of life were eminent professors who had their early intellectual training at Yale in the famous class of 1837.

In his college career he did not fail in accomplishing what was to be expected of him. With his quickly apprehensive and retentive mind the requirements of the college curriculum of that day were

easily mastered, and the college prizes for scholarship and the rank of third at graduation attest his excellence. In the equally important voluntary and free student life he was always one of the leaders. The Linonian Society, one of the two great debating societies of Yale, of that day, then flourished. Over its affairs as secretary and vice-president he had some direction, and to its influence he ascribed a large share in laying the foundation of whatever force and skill he might lay claim to as a public speaker.

Many fugitive magazines had come into being in the college and had vanished, until some of the members of his class, in 1835, with him in the chair, organized and edited the Yale Literary Magazine, which has had the credit, during its long career, of representing the thought and literature of the college at its best. It lives to-day, though possibly obscured in its importance by the precedence which the present times award to muscular skill and prowess.

Of a social disposition, easily making friends, he was known among his associates as Bill Evarts, and that he was a boy of some spirit one may readily imagine, without the evidence of the fact that the authorities of the college thought it necessary on one occasion to send to his guardian a warning as to his conduct. It was not any flagrant wrong but some slight insubordination which had attracted the scrutiny of the faculty.

After a year, following his graduation, spent in

teaching school and reading law at Windsor, Vermont, he entered the Dane Law School at Harvard, then presided over by Professors Story and Greenleaf. With him at the law school were his cousin Rockwood Hoar, with whom he had already an intimate friendship, and Richard H. Dana, Jr., (always to be known as the author of "Two Years Before the Mast") with whom a friendship was here formed which lasted through life in unintermitted and increasing strength. These two men were probably his closest friends in after life, and these friendships based on mutual esteem and respect were never disturbed by the differences of opinion and views in political affairs, which were often marked.

At the law school the age of tutelage had ceased. The consciously serious preparation for life's vocation had begun. As we approach the life career of Mr. Evarts let us listen to his friend Dana's retrospective and prophetic estimate of him written shortly after law school days.

The most successful speech made at the school during the whole time I was there was made before a jury of undergraduates, Judge Story on the bench, by Wm. M. Evarts. A law argument which he introduced into it, addressed to the Court, was the most complete, systematic, precise, elegantly spoken law argument I have yet heard, including many arguments of our most distinguished counsel before our highest courts. Evarts' jury argument was very well done, but Wm. Davis of Plymouth, who was his opponent, did quite as well to the jury. Evarts' was the best law, and Davis' the best jury argument I heard in the school. When charging the jury, Judge Story said he must rule the law

in certain points against the defendant's counsel (Evarts) though they had been argued to him "in a manner to which I cheerfully do homage." Judge Story always complimented liberally, but never went so far as in this instance. Indeed, Evarts has been a peculiar young man at school, college and in his professional studies. If he does not become distinguished he will disappoint more persons than any other young man whom I have ever met with.

That such disappointment was not to be, this country, at least, has learned to know.

His first expectation was, after his law school life, to remain in Boston, but some "casual suggestion of a comrade" led him to look to New York as the place in which to complete his education, with the possibility which then might present itself, of entering upon a professional career there. His knowledge of Mr. Daniel Lord, then and for many years after, the foremost commercial lawyer at the bar, and the opportunities he had for a favorable introduction to him, had much to do with this step. Accordingly in the summer of 1839, armed with letters to many of the best New York families he set foot in the city which then had much the same characteristics as now, relative to the other cities of the country.

"Let me introduce to your special regard" writes a gentleman in Boston, to Mr. Paul Spofford, a New York merchant, "Wm. M. Evarts, Esq., in whom both for his own sake and as the representative of the *best* families, I feel a strong interest. He goes to your great city to complete his professional studies with Mr. Lord—and it will give me much grat-

ification to learn that you have done anything to make him feel *at home* there."

Judge Story gives him, at his desire, a letter to Judge Kent. In it he speaks of his "young friend who has just quitted the Law School," and mentions his "very uncommon talents and professional attainments for his years," closing with this tribute, "I think him destined to take a very elevated rank in the profession, and he is one of the few to whom I am ready to confide the future advancement of the law."

The arrangement with Mr. Lord had already been agreed to. Mr. Evarts, in an eloquent tribute to the memory of "my master, my guide and friend," thus relates the interview when he presented himself to take up his position in the office:

When, at the appointed time, the succeeding summer, that of 1839, I presented myself, he said:—"Well, Mr. Evarts, you have come to commence your studies and be a lawyer in New York," and I replied doubtfully, perhaps, as I supposed, modestly, "I have come to try."—"Well, sir," said he, "if you have only come to try, you had better go back; if you have come to stay, we shall be glad to receive you;" and when I amended my answer by the information he gave me that it was possible for me to stay, that I had come to *be* a lawyer, he received me cordially; and from that time to the time of his death he has been my friend, my supporter and my guide.

Letters of his written at this period have preserved for us a charming picture of this young man with brilliant intellectual endowments, courteous and well-bred, sparkling with wit, brimming over with

genial humor, fond of all the pleasant things of life, with a hearty interest in all that was going on about him, with great zeal in his professional studies, and a genuinely modest but none the less unfaltering confidence in his own powers and in the professional success that surely awaited their cultivation and use. This confidence did not serve as an excuse to lessen his labors. "*Palma non sine pulvere*," a motto adopted by him in his youth, no doubt served him as a mentor in the early struggle of his career, and he soon became known for his industry quite as much as for his brilliant intellect.

Admitted to practice in 1841, upon Mr. Lord's advice he established himself in his own office, at 60 Wall Street "whither all communications of business or friendship are to be directed," as he writes in October of that year.

Within two weeks after opening his office it was his good fortune to be retained as junior counsel in the defense of the notorious forger, Monroe Edwards, and upon him devolved the greater part of the preparation for trial.

There was an imposing array of counsel with men of eminence in the profession engaged in the case. Ogden Hoffman, retained by the defrauded New York merchants to aid the district attorney, led in the prosecution; Senator Crittenden of Kentucky was at the head of the defense; Judge Kent presided at the trial. The cause aroused great public interest and the trial was not without its dramatic incidents.

The junior counsel had expressed some doubts to a friend as to whether his "youthful relation to the other counsel would enable him to speak on the trial" and was fain to be content with the opportunity which "the whole burden of preparation for trial" would give to show his "skill and ability to some eminent lawyers if not to the public at large." His preparation, however, had been so capable and thorough, that when the time arrived, the opening of the defense to the jury by the choice of his associates fell to him. Feeling no doubt the weight of the responsibility and recognizing the value of the opportunity, he set himself, the evening before the case for the defense was to be opened, to the preparation of his address to the jury by reducing it to writing. After a few sentences it occurred to him that if he could put his thoughts into written words there was no reason why he couldn't as readily put them into spoken words and that the writing at length what he had to say was a useless and tedious intermediary between thought and speech. Accordingly, he desisted and the next morning, intending to speak about fifteen minutes, he delivered an address of about two hours in length, eagerly listened to by a crowded court room and greeted at its close with expressions of involuntary applause which were promptly and severely repressed from the bench.

His client was convicted; his expenditures in the cause of his client had exceeded his receipts; but at the age of twenty-four he had gained a commanding

reputation at the bar and a foremost place among those of his age in the profession.

In 1842 he associated himself with Mr. Charles E. Butler upon the latter's invitation under the firm name of Butler & Evarts, Mr. J. Prescott Hall acting as counsel in connection with the firm. Mr. Butler was a man of about Mr. Evarts' age, and, if tradition may be trusted, was a son of the gentleman against whom Jeremiah Evarts had, in his regard for official duty, sought to enforce the law of Connecticut against driving on Sunday.

The continuous career of this parent firm and its successors, all of which bore Mr. Evarts' name as a partner, under the varying titles of Butler & Evarts for ten years, Butler, Evarts & Southmayd, for seven years, Evarts & Southmayd for a short interval of five months, Evarts, Southmayd & Choate, for twenty-five years, and Evarts, Choate & Beaman, for sixteen years, has passed into the history of the profession in New York with a record it is not too much to say, unsurpassed, and no formal document ever defined the terms of the partnerships or limited their duration.

The limits of this article do not permit any detailed narration of the various steps by which this young lawyer year by year advanced in professional employments and fame, of how he bent every energy, made every association, took every avenue which would lead to substantial professional eminence. Nor can we pay attention to any one of the

many private causes in which he was employed—some of great interest to the studious lover of his profession of to-day. But any consideration of Mr. Evarts as a lawyer without adverting to his participation in some of the public causes with which his name will always be associated, would be Hamlet without the play.

The first of these to absorb the public attention, the “Lemmon Slave Case” arose from the following facts:

In the year 1852 Jonathan Lemmon and his wife, residents and citizens of Virginia, embarked upon a journey from their own state, their ultimate destination being the state of Texas, taking with them a number of persons held by them under the law of Virginia, as slaves. The route chosen took them by boat to New York where they were to remain only for the interval between their arrival and the departure of another boat from New York for Texas. During this interval, their slaves were confined and forcibly detained in a house in New York City and being there discovered, a writ of *habeas corpus* was applied for and issued out of the Superior Court to inquire into the cause of their detention. The return to the writ being demurred to generally, brought squarely in issue the question of whether the transitory abode of these slaves upon the free soil and under the free laws of the state of New York released them from their bondage. The effect of the decision in the court of first instance,

sustaining the writ and freeing the slaves, was to transform a law suit involving private interests into a great public legal contest between the states of Virginia and New York upon the grave questions of the rights and limits of the "peculiar institution" of slavery which then absorbed the thoughts of the whole country to the exclusion of every other public question.

Upon the recommendation of the Governor of Virginia, the Legislature of that state provided for the employment of counsel to prosecute the appeal; the Legislature of the state of New York retaliated by a similar measure engaging additional counsel to aid in support of the decision. Upon the death of Ogden Hoffman in 1856, who had continued in the case, though his official connection as Attorney-General had ceased at the close of the previous year, Mr. Evarts, by appointment of Governor King, became chief counsel in the case for The People of the state of New York, Mr. O'Connor having been similarly retained for the state of Virginia.

With sovereign states as antagonists upon such portentous issues the contest was not likely to stop short of the highest tribunal.

On the day of its argument before the full bench of the Court of Appeals of New York, January 24th, 1860, the court room thronged with spectators, The Albany Law School, professors and students alike went as peculiarly interested in the great forensic battle about to take place.

The nature of the contest and of the contestants, and the fame of the champions who were to represent them drew a crowd of lawyers and men of affairs such as is seldom seen in a court room, and which lent dignity and solemnity to the occasion. It was a *legal* battle; reference to political causes or effects, the popular excitements and resentments of the day which had brought the cause before the court had no true place in the argument, but it was scarcely to be expected that such reference could be wholly excluded. Mr. Evarts' argument was a purely legal one, but at its close he replied, in a splendid and prophetic peroration, to the insistence of his opponent that unless the Court of Appeals or the Supreme Court of the United States should reverse the judgment, "our Federal system of Government is actually in danger—that indeed it cannot long exist without both a judicial and popular recognition of the *legal* universality of slavery throughout our Country." A quotation from his reply will serve as an excellent example to the reader of Mr. Evarts' style.

If it please the Court, I am unable to discover in the subject itself, or in the aspect of the political affairs of the country, any grounds for these alarming suggestions, which should disturb, for a moment, your Honor's deliberations or determinations on the subject before you. I may be permitted to say, however, that if the safety and protection of this local, domestic institution of slavery, in the communities where it is cherished, must ingraft upon our Federal jurisprudence the doctrine that the Federal Constitution, by its own vigor, plants upon the virgin soil of our

common territories the growth of chattel slavery—thus putting to an open shame the wisdom and the patriotism of its framers—if they must coerce, by the despotism of violence and terror, into its support at home, their whole white population; if they must exact from the free states a license and a tolerance for what reasons of conscience and of policy have purged from their own society, and subjugate to this oppression the moral freedom of their citizens; if the institution of slavery, for its local safety and protection, is to press this issue, step by step, to these results; if such folly and madness shall prevail, then, by possibility, a catastrophe may happen: this catastrophe will be, not the overthrow of the general and constituted liberties of this great Nation, not the subversion of our common government, but the destruction of this institution, local and limited, which will have provoked a contest with the great force of liberty and justice, which it cannot maintain, and must yield in a conflict which it will, then, be too late to repress.

Mr. Evarts has related as an instance of the generosity of Mr. O'Connor as an adversary, a personal incident of this case. Mr. O'Connor, on behalf of the appellants, had closed the argument and when the court had retired, the lawyers within the bar crowded about the two chief participants full of expressions of enthusiasm and praise. Mr. Evarts, turning to Mr. O'Connor, said: "Well, Mr. O'Connor, they tell me this has been the finest argument ever heard in this court," to which Mr. O'Connor replied: "I cannot speak for my own, but certainly yours was very fine, and not the least fine passages were where you hit me the hardest." The Court of Appeals approved the judgment, the war wiped out forever the occasion and the sub-

stance of the controversy. It never reached the Supreme Court of the United States.

Another case of great public interest and importance at the time, in which Mr. Evarts was engaged, arose in the early days of the Civil War, being the direct outcome of the "insurrection." This was the case of the "Savannah Privateers," being the trial of the captain and crew of the schooner "Savannah," a Southern privateer, on the charge of piracy under the United States' statutes. The schooner had been fitted out in May, 1861, and armed with a swivel gun and furnished with letters of marque issued by Jefferson Davis as President of the Confederate States of America, began her career of depredation upon the commerce of the United States. After capturing one vessel and cargo in June of that year, she was herself captured by a United States war vessel and her captain and crew taken prisoners. They were turned over to the civil arm of the Government, and indicted by the United States Grand Jury as robbers on the high seas, the penalty, upon conviction, being death. Mr. Evarts was retained by the Government to aid in the prosecution, Mr. Delafield Smith being United States District Attorney.

As a case, it has of course no living interest to-day, but its record furnishes the most instructive and most delightful reading. The merits of the case hinged upon the force of the commission under which the prisoners had acted, in exculpation of

their guilt. The defense was that the commission purged the proceedings of its moral turpitude and that the prisoners stood as participants in a form of warfare recognized under the law of nations, and while their capture subjected them to a reckoning with the military they should escape the condemnation of the civil authority. This justification brought into the discussion of the case as presented by the counsel for the defense the questions of the political status of the seceded states, their relation to the Government, the right of secession, and indeed the whole nature and framework of our Government. All these were discussed before the jury with great learning and skill, covering a wide field of political philosophy and history.

Though many of these considerations did not commend themselves to his judgment as pertinent to the cause, Mr. Evarts answered the views advanced by his opponents, in a masterly summing-up, which clearly set forth the position of the Government in that early period of the strife. As one reads it to-day, one feels a responsive thrill akin to that which must have aroused the courage and sustained the faith of the loyal men of the North who read in the living present the uplifting words of this keen, clear-headed, eloquent champion of their cause.

The number of the defendants brought together in the case a larger number of eminent lawyers than might otherwise have been the case. Daniel Lord in the lead, with James T. Brady, the elder La-

rocque, Algernon S. Sullivan and others of less eminence, were for the defense. The jury disagreed. Mr. Evarts wrote at the time about the case to his friend Mr. Dana, in Boston, only as a man would write to his intimates. After stating that he had requested to have his own and Mr. Lord's points sent to Mr. Dana and promising a copy of his address to the jury should it be printed, he adds:

The trial was quite a laborious and responsible one for me, and I was retained for the Government, only the day before the trial began. I had seven counsel with seven separate speeches against me, and had to reply (1) for the Prosecution, (2) for the Government, (3) for the Republican Party, (4) for the Free States, (5) for the Nation, (6) for the principles of constitutional government, (7) for the human race, and all this tho' I had a fee only for *one* of these interests.

I believe the general notion is that I had considerable of a speech. In its length I can answer 7 h. 30 min.

We shall argue the Prize Appeals in the Circuit next week.

The so called "Prize Causes" to which allusion is made in this letter, and in which his friend Mr. Dana, as United States District Attorney, was associated with Mr. Evarts, were of great importance to the government at the time and involved the discussion of great questions of public and international law. Their final determination by the United States Supreme Court favorably to the Government's contention was a very considerable factor in the suppression of the war. The chief difficulty of these cases was to establish satisfactorily the application of the

law of prize, as enforceable under the law of nations against neutral commerce attempting to violate a blockade established in a war between separate political powers, to the situation presented in the Civil War, upon the theory of the Government of the United States that the war was an insurrection and that the political integrity of the Country had not been modified. The reader will find an interesting and clear statement of these cases, by Charles Francis Adams, in his life of Dana. Dana added much to his own renown in his presentation of these causes.

We must pass over the private mission to England upon which Mr. Evarts was despatched by the Government in 1863, and again in 1864, to take but a glimpse of him in the three great public causes which drew the attention of the world and in which he played a conspicuous part—The Impeachment of Andrew Johnson, The Geneva Arbitration, The Electoral Commission. It was his position and rank as a lawyer that brought him into all these cases. No especial political association, no connection of special friendship, nothing but the demand which the exigencies of the occasions created for the engagement of the most efficient counsel who might measure up to the very grave and far-reaching public and political—not party—interests involved, favored these employments.

No more dignified, brief, survey and presentment of the Impeachment Trial can be given than in the words of the Counsel for the President, in his

Eulogy, delivered before the Alumni of Dartmouth College, of the great Chief-Justice presiding over the Senate sitting as a court who "brought into the Senate under his judicial robes, no concealed weapons of party warfare . . . and had not plucked from the Bible, on which he took and administered the judicial oath, the commandment for its observance."

Mr. Evarts emerged from the trial with added fame. His arguments in this and in the Lemmon Slave case are perhaps the best examples of his forensic efforts.

His eloquent and solemn appeal lifted the whole proceeding from the murky atmosphere in which it had had its origin, to a region of lofty and patriotic wisdom from which to view the transaction that held stupendous consequences, however mean and low the causes that had set them in motion and were pressing them forward; it arrayed with great force and learning the arguments upon the only serious question of law in the case—that arising from the tenure of office act; and it held up to scornful condemnation and ridicule the trivial accusations which the managers had inserted as makeweights in the Articles of Impeachment; it is not easy to think that it did not have its share in holding the wavering senators to their consciences in its majestic and impressive warning not to disregard their judicial oaths.

One of the most famous as being most widely

known passages in his speech is that in which the rhetorical hyperbole in the speech of Mr. Boutwell—one of the managers for the impeachment—was displayed with merciless ridicule in all its absurdity. The passage of Mr. Boutwell's speech begins "Travellers and astronomers inform us that in the Southern heavens, near the Southern cross, there is a vast space which the uneducated call the hole in the sky, where the eye of man, with the aid of the powers of the telescope, has been unable to discover nebulae, or asteroid, or comet, or planet, or star, or sun." He then expatiated on the chaos in that "dreary, cold dark region of space," and then, so enormous were the offenses of the President, he says that were the earth endowed with human faculty and sentiment "it would heave and throw with the energy of the elemental forces of nature and project this enemy of two races into that vast region, there forever to exist in a solitude as eternal as life or as the absence of life, emblematical of, if not really, that 'outer darkness' of which the Savior of Man spoke in warning to those who are the enemies of themselves, of their race and of their God."

While Mr. Boutwell was delivering this extravagant piece of oratory, Mr. Evarts turned to his associate, Judge Curtis, and said: "I'll put Boutwell into that hole in the sky so that he'll never get out again," and he did. On the second day of Mr. Evart's address to the Senate, he gives his attention to Mr. Boutwell, in this famous interjected passage:

I may as conveniently at this point of the argument as at any other, pay some attention to the astronomical punishment which the learned and honorable manager, Mr. Boutwell, thinks should be applied to this novel case of impeachment of the President. Cicero I think it is, who says that a lawyer should know everything, for sooner or later there is no fact in history, in science, or of human knowledge that will not come into play in his arguments. Painfully sensible of my ignorance, being devoted to a profession which "sharpens and does not enlarge the mind," I yet can admire without envy the superior knowledge evinced by the honorable manager. Indeed, upon my soul, I believe he is aware of an astronomical fact which many professors of that science are wholly ignorant of. But nevertheless, while some of his honorable colleagues were paying attention to an unoccupied and unappropriated island on the surface of the seas, Mr. Manager Boutwell, more ambitious, had discovered an untenanted and unappropriated region in the skies, reserved, he would have us think, in the final councils of the Almighty, as the place of punishment for convicted and deposed American Presidents.

At first I thought that his mind had become so "enlarged" that it was not "sharp" enough to discover the Constitution had limited the punishment; but on reflection I saw that he was as legal and logical as he was ambitious and astronomical, for the Constitution has said: "removed from office," and has put no limit to the distance of the removal, so that it may be, without shedding a drop of his blood, or taking a penny of his property, or confining his limbs, instant removal from office and transportation to the skies. Truly this is a great undertaking; and if the learned manager can only get over the obstacles of the laws of nature the Constitution will not stand in his way. He can contrive no method but that of a convulsion of the earth that shall project the deposed President to this infinitely distant space; but a shock of nature of so vast an energy and for so great a result on him, might unsettle even the footing of the firm members of Congress. He certainly need not resort to so perilous a method

as that. How shall we accomplish it? Why, in the first place, nobody knows where that space is but the learned manager himself, and he is the necessary deputy to execute the judgment of the Court.

Let it then be provided that in case of your sentence of deposition and removal from office the honorable and astronomical manager shall take into his own hands the execution of the sentence. With the President made fast to his broad and strong shoulders, and having already essayed the flight by imagination, better prepared than anybody else to execute it in form, taking advantage of ladders as far as ladders will go to the top of this great Capitol, and spurning then with his foot the crest of Liberty, let him set out upon his flight, while the two houses of Congress and all the people of the United States shall shout, "*Sic itur ad astra.*"

The only justification for this digression in so broadly ridiculous a vein could be that it should be completely well done. Mr. Boutwell had endeavored to minimize the influence of the President's counsel, in their insistence that the proceedings should be conducted upon the same rules as obtained in courts of law, by speaking of them as attorneys whose devotion to their profession had served to "sharpen but not to enlarge their intellects." If Mr. Boutwell had expected any such slur upon the profession to go unresented or unheeded by Mr. Evarts, he was much mistaken, and it behooved him to take good care that no extravagances of his own should give to his opponent any opportunity of ridicule. The Senate laughed, the country laughed, and to the day of his death he was known by the sobriquet "hole in the sky Boutwell."

No contrast could have been greater than that be-

tween the foremost manager of the prosecution, General Butler, and the leading counsel for closing the defense, Mr. Evarts. It was well illustrated in this case. In a majestic period in which he called upon the senators to obey their oaths as judges are these words:

And be sure that loud and long as these honorable managers may talk, although they speak in the voice of "all the people of the United States" with their bold persuasions that you shall not obey a judicial oath, I can bring against it but a single sentence and a single voice, but that sentence is a Commandment and that voice speaks with authority: "Thou shalt not take the name of the Lord thy God in vain, for the Lord will not hold him guiltless that taketh his name in vain."

General Butler said this Commandment applied only to the use of, as he termed them, "cuss words."

The morning after his first day's speech (his argument extended over four days), while Mr. Evarts was preparing to go to the Capitol, Mr. Seward was announced as a caller. Mr. Seward had read the report of the speech in the morning papers, and as he entered the room he held up his hands exclaiming: "Ah! Mr. Evarts, the Country is safe!"

The speech was a very great one, and to be fairly appreciated should be read. His friends, like Mr. Seward, have given to it great praise. Impartial critics have spoken of it as almost achieving the impossible. Before any tribunal intent upon doing impartial justice, there could have been no doubt of its prevailing. If one instance may be an indi-

cation, it had its effect upon the temper and attitude, at the time, of the people of the country. In a secluded country village, the writer has been told, an intelligent and interested man, owing his allegiance to the Republican party and sharing its hatred of the President, after reading Mr. Evarts' speech, remarked to his son: "Well, perhaps Mr. Evarts is right." It was not long before the whole people were sure that he had been right.

The record of the events which led up to the Electoral Commission is as unpleasant to contemplate as any that our history discloses. The election of 1876 was marked in the southern states, notably Florida, Louisiana and South Carolina, by the grossest acts of intimidation and murder and outrage on the part of the Democrats to suppress the Republican vote, while on the other hand the canvass of the votes being in the hands of the Republicans was accompanied, no doubt, by equally gross fraud in the suppression of the ballots cast and in declaring the result for the Republican Electors. The electoral votes of these three states and one electoral vote in Oregon were in dispute, each party laying claim to them, and the results of the election in these states, being certified to by two or more varying and conflicting certificates from each state. If the votes in all the disputed states were given to the Republican candidate, Mr. Hayes, he would receive a bare majority of one vote in the electoral college and would be entitled to the presidency. There

was no existing method and no precedent by which the disputed questions could be settled. Congress thereupon, after long debate and many different proposals, passed the Act creating the Electoral Commission to be composed of five senators, five members of the House of Representatives and five judges of the Supreme Court. It was further provided that the decision of this tribunal was to be final unless overruled by both the Houses of Congress voting separately.

The political considerations which agitated Congress and the country hardly concern us here. Unfortunately, however, for the complete acceptance of the decisions of the Commission by the people of the country at the time, those decisions were made upon the strictly party vote of eight to seven. The popular feeling was subsequently somewhat allayed by the public disclosure of the apparent attempts on the part of the Democrats to purchase the electoral vote in some of the disputed states.

The first question that presented itself to the Commission was one affecting its own powers, which was, baldly stated, how far it could go, if at all, beyond and behind the returns presented by the certificates forwarded to Congress.

The public clamor and vituperation that assailed every one including the counsel and the President himself, who had any connection with the prevailing party in the case was no doubt due partly to partisan adherence and partly to a wilful or ig-

norant misunderstanding of the real basis of the decision.

Mr. Evarts did not escape criticism from some at the time for acting as counsel in the cause for the Republican party. Many, Republicans and Democrats alike, thought that Mr. Tilden had fairly been elected President and that being so it was not the part of a good citizen to be a partisan, and that accepting the representation of the Republican party in the legal battle that was to ensue, was an act of partisanship at the expense of his duties as a citizen. He answers such insinuations in his argument before the Commission :

This being so, we come to the primary question of interest to the public, of interest to all citizens, of interest to every man who loves his country, every man who loves its Constitution in its spirit of being popular government, obedient to law; and I am at a loss to see that anything that I have to say on this subject should approve itself to one portion of this Commission and be unpalatable to another by reason of any political adhesions of one side or the other. I shall say nothing that I would not say as a citizen holding the common ground with all of you who are citizens first and partisans afterward.

When I talk of the mischiefs in the State of Louisiana which are attempted to be curbed and robbed of their rapine by the energetic laws of that state, I do not understand that to any man, because his inclinations or his convictions incline him in favor of the elevation of Governor Tilden, I am to impute that he looks with less horror upon that subjugation of the suffrage, that degradation of citizenship, that confusion of society, that subversion of the Constitution than I do. He only wishes that it should be curbed and redressed by law. And when I speak of the frauds as charged—for I must speak of them as charged at this stage of

the business, for they have not been proved at all—when I speak of them as charged, involving falsifications, oppression, false counting, forgery, conspiracy, every shade of the *crimen falsi*, am I to be charged in this presence or any other with having less complacency even in the lowest grade of this vice than those who uphold their correction and desire that they shall be frustrated, when I demand that it shall be done by law?

That is my demand. Is it a partisan demand? It is the same demand that is made in respect to the gross afflictions which every citizen feels as beaten by the same stripes that were inflicted on the backs of those poor, unbefriended negroes. That is citizenship; it is not partisanship. And when this other vice is added to violence, together ruling the evil in the world—violence and fraud—when that other form is corrupting and afflicting our citizenship, I feel it as bearing a full share of the common shame, whether it be inflicted by the relentless and shameless tyranny of the New York dynasty or by the alleged frauds of the Louisiana dynasty. But why is it that fraud is so detestable? Why is it that the law searches for it as with candles and condemns it when it is brought into judgment? Because it is but another form of violence—*Fraus æquiparatur vi*. That is the reason why the violence that ravishes is no more heinous than the fraud that secretly purloins the virtue and the fame of American citizenship.

The case was decided upon very narrow and technical points of law as to the limitations under the Constitution of the powers of the Federal Government, in a national election, to revise or reform the action of state officials in the performance of duties imposed and sanctioned wholly by state authority. It is not likely we may hope that the situation, which brought the Electoral Commission into being, will occur again in our politics. Its chief importance was that it solved a great practical problem; the

chief occasion for any pride in the whole episode is the ready and reverent obedience to law evinced by the people of this country in their acceptance of the decision. It may be fairly questioned, also, whether, if the action of the Commission had been actually so heinous and wicked as its most hostile critics declared, the people of the country would have subsequently elevated to the Presidency one of its number who had voted upon the prevailing side.

No extravagance of phrase can magnify the situation presented at Geneva before the tribunal which was to determine the differences between England and the United States under the treaty of Washington. The Commissioners acting for the United States in the negotiations for the treaty had accomplished great results in the insertion of the three rules of law as to the "due diligence" to be required of neutrals to prevent the use of their territory for hostile purposes by either belligerent in time of war, as the rules by which the acts of Great Britain during our Civil War were to be judged by the arbitrators. These rules provided that a neutral government was bound to use "due diligence," in the first place.

To prevent the fitting out, arming or equipment within its jurisdiction, of any vessel which, it has reason to believe, is intended to cruise or carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on

war as above, such vessel having been specially adapted in whole or in part, within such jurisdiction to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. Thirdly, to exercise due diligence in its own ports or waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties; it being a condition of this undertaking, that these obligations should in future be held to be binding internationally between the two countries.

These rules as thus formulated were considered as in advance of what was supposed at the time to be the requirements of international law, and although it would seem upon a superficial glance that they were in the treaty as the law of the case to be laid before the tribunal, the counsel for Great Britain, Sir Roundell Palmer, undertook to maintain that the acts of his client were to be viewed in the light of the law as understood prior to the pronouncement of these rules. The matter was discussed before the Tribunal orally and Mr. Evarts made the chief argument for the United States in an address occupying two sessions of the tribunal. It has been said of it by a fellow lawyer: "There is, perhaps, no finer exposition extant of the great rules of international comity regarding the duties of neutrals to belligerent nations." As is well known the assertion in the case of the United States before the court of what were known as the "indirect claims" of loss suffered through the conduct of England in

the war, seriously threatened the whole proceeding with a disastrous and abrupt termination. The whole credit for the final solution of the difficulty into which the naturally exasperated temper of the English representatives threw the situation, has been ascribed to Mr. Adams, the arbitrator appointed by the United States upon the Tribunal. But much, no doubt, is due to the influence of Mr. Evarts with the opposing counsel, in bringing about the final outcome. He had already become favorably known to them personally upon the occasion of his visits to England in 1863 and 1864, and they reposed great confidence in him. It was always a source of great satisfaction to Mr. Evarts that, while there was much anxiety and doubt in this country as to how matters would be settled, Mr. Seward had ✓ said "We need have no fear, Mr. Evarts is there, and everything will come out all right."

England had sent the best men she had to represent her and the United States had in their representatives men who reflected great credit before the world. Of the three counsel for the United States, Mr. Cushing, Mr. Waite and Mr. Evarts, the last no doubt added more to his personal renown in his association and conduct in the cause. Sir Roundell Palmer spoke of him in these words: "He was keen, but high-minded . . . I could trust him implicitly where I had to deal with him alone. . . . Altogether he was a man of whom any country might well be proud." To-day, in the

room where the Tribunal held its sessions, to Americans is pointed out by the guides the chair "in which your great Mr. Evarts sat."

Mr. Evarts was a reverent lover of his calling, and never in his long career in the courts did he lapse in his bearing towards or his treatment of counsel or the court, from the attitude of regard and reverence due to the administration of the law, often when he could have none of the same feeling for those through whom at the time it might be administered. He held his ideals constantly before him. When upon the death of Chief-Justice Taney in 1864 it was thought by many, in and out of the profession, that Mr. Evarts should be his successor, all the judges of the Court of Appeals of New York signed a letter addressed to the President in his behalf, in which after testifying to his extended and varied juridical learning, they thought it important enough to state:

He is preëminent, for the refinement, courtesy and dignity of his manner, and these qualities are not undeserving of consideration in a man who is to occupy the place heretofore filled by a Jay, Ellsworth, Marshall and Taney.

At a time when there was a much stronger fraternal feeling at the bar than now can exist in New York, he shared it to the greatest degree. Mr. Choate for so many years his partner has more than once in public utterance spoken of his former chief as the kindest and most generous of men towards his brethren of the bar. Never did he descend to

personal conflict, and with all his power of ridicule and keen irony seldom if ever were his shafts envenomed. We may see in his tribute to Ogden Hoffman what he held up to himself as a rule of conduct.

But, sir, who shall take up the voice of forensic and of public eloquence now hushed, for the moment, only, let us hope, on his bier? I do not know how it will be—I do not know whether eloquence in a free country is to be divorced from the hustings, and is no longer to be heard in its old home of the forum—but whoever it shall be, let him learn that if eloquence is, as the greatest Grecian master of it said it was, a weapon, depending for its effect on the force and skill of the man who wielded it—let him learn, I say, to wield it as Ogden Hoffman wielded it; let him know that a sharp tongue and a bitter voice, though they may yield a triumph of the intellect, yet in wounded friends and bleeding enemies carry no credit to the heart of the man who employs them. Let him use his eloquence for public justice in his duty as a lawyer, as the soldier uses his sword in his duty as a soldier; and let him know that it is no part of a true soldier at the Bar to brandish his weapon of eloquence in a mere gladiatorial show to wound witness and party and counsel and friend, but that it is to be directed to pierce through the joints and marrow of a cause, and there only to be employed. I do not know, sir, that great intellectual abilities, great professional experience and discipline, and great powers of eloquence were ever attuned to a kinder sympathy, or tempered with kinder sensibilities than in the use that Ogden Hoffman made of them all.

A clever writer of our day has said that history never begins until reminiscence has ended. Though Mr. Evarts' active career as a lawyer ceased nearly twenty years ago, his memory at the bar still remains to many who knew and heard him. No ade-

quate memorial of his career has yet been made. It may be that in all his "infinite variety" no adequate memorial *can* be made. But in all the different aspects of Mr. Evarts, whether as a wit, an after-dinner speaker, a conversationalist, an orator, a statesman or a lawyer, no doubt his title to the greatest and most enduring fame is that of the great Lawyer.

The writer has not undertaken here, to investigate and discuss any movement or change, or modification, or advancement, in the great body of the law in its administration or substance as it may have been forwarded or influenced by his exertions. Mr. Evarts was preëminently an advocate and an active practitioner caring for great interests having "to do with living men and women and real personal deeds." With a firm and comprehensive grasp of general principles, his own quick wit and acute perception applied them with unerring accuracy to the business in hand, always ready, always adequate to the occasion; no abstract theory or purpose as to molding or changing the law could absorb his attention.

The calling to the mind of the reader some of the most conspicuous, the most important causes, those of the greatest gravity with which Mr. Evarts was associated, and in which he was a controlling force, may as serviceably as any other way suggest the most conspicuous influence he may be said to have had on the law. It has been the endeavor in this brief

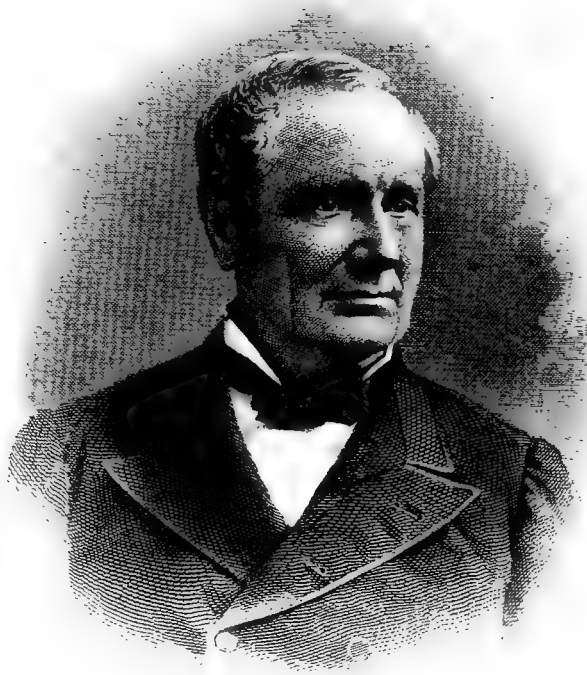
and reminiscent sketch to excite, if may be, in the reader, whether he be lawyer, law student or thoughtful layman, such interest in the man himself as may lead to personal and individual study of the cases in which he was engaged. If it may be said of a lawyer's influence—in modifying the view that it is evanescent and is gone into oblivion with the papers of his cases that he files away—that it is enduringly preserved in the judgments of the tribunals whose decisions he has shaped, then upon that measure the influence of Mr. Evarts *as a lawyer* may be found in history.

It was exerted in sustaining the just equilibrium of two coördinate branches of our government against threatened overthrow by party rage, in the impeachment of a president; again in maintaining the clear line of cleavage between the functions, the province and the powers of the national and state governments in presidential elections, before the Electoral Commission; and again (in the words of his toast) in "The little Court room at Geneva—where our royal mother England and her proud, though untitled daughter, alike bent their heads to the majesty of Law, and accepted Justice as a greater and better Arbiter than Power."

THOMAS A. HENDRICKS.

THOMAS A. HENDRICKS

From a steel engraving. Artist unknown.



THOMAS A. HENDRICKS.

1819-1885.

BY

LOUIS B. EWBANK,

of the Indiana Bar.

THOMAS A. HENDRICKS was not a native of Indiana. He was born in Ohio, September 7th, 1819. His parents were a newly-married couple from Pennsylvania, seeking a home in the western wilderness. They carried Thomas to Madison, Indiana, when he was six months old. In Indiana he lived and labored and so belongs to that state rather than to the state wherein he was born.

After a short residence at Madison, the family removed in 1822 to the site of what is now Shelbyville. There the parents lived and died, and there Thomas made his home until he removed to Indianapolis in 1860. Mr. Hendricks belonged to a family of lawyers and statesmen. An uncle, William Hendricks, was the member of Congress from Madison when his infant nephew was brought to that town in 1820. That uncle was soon afterward elected the second governor of Indiana. He became United States Senator in 1825, and represented his adopted

state in the senate for twelve years. Another uncle was a congressman from Indiana. His mother's brother, Alexander Thomson, was for many years president judge of his judicial district in Pennsylvania, and later opened a law school in Chambersburg in that state, at which Thomas afterward studied. His father, John Hendricks, was assistant surveyor of public lands for several years, and, by holding office in the state militia, acquired the title of Major by which he was familiarly known. His grandfather, Abraham Hendricks, was a member of the Pennsylvania Legislature, and the name of Hendricks is frequently found in the list of public officers and statesmen in earlier generations.

Of his school days but little is recorded, and none of his schoolmates are now alive. He was given a liberal education, according to the standards of that day, in what was then the far west. It is said that he was studious and was regarded as a lad of promise. He remembered one of his early teachers with great affection, and another as entirely too free with the rod. He had access to but few books, and the Bible, the poems of Shakespeare, Milton and Byron, a history of England, and a copy of Blair's Rhetoric received such careful study as is not often given them in these days of circulating libraries. His school days were coincident with the greatest renown of Webster, Clay, Calhoun, and other famous orators of the first half of the nineteenth century, when oratory and declamation were in high favor.

The art of speaking in public then received more attention than any branch of study except arithmetic and spelling, and the earliest trait of promise which his teachers noticed in young Thomas was his diligence in committing "pieces," and his success in declaiming them. It is said that he would grow so absorbed in repeating to himself the poem or speech which he was learning, as he walked to and from school, that his schoolmates who overheard him often jeered at him.

The schools of Indiana were few and poorly furnished during its early history. It was not until the session of the Legislature, 1849, of which Mr. Hendricks was a member, that the first law providing for compulsory free schools was passed; while the school fund by which, in large part, those schools are now maintained, was created and established by later legislation. But he had the good fortune, at the age of nine years, to attend a school kept by Mrs. Kent, a young woman who was educated in New England and came to Indiana with her husband, when he accepted a call as pastor of the Presbyterian church at Shelbyville. Two years later the Shelby County Seminary was organized, with the Reverend Eliphalet Kent as its first principal, and Thomas as one of its first pupils. He afterward went to a short-lived "college," a dozen miles away to the southeast. There he pursued academic studies until 1836, when at the age of seventeen he entered Hanover College. Hanover is a Presbyterian school

that still flourishes on a hill overlooking the Ohio River five miles from the city of Madison. Among his fellow students at Hanover was Albert G. Porter, who also practiced law at Indianapolis for many years, became Governor of Indiana in 1880, and was afterward United States Minister to Italy.

At college Thomas was remembered as having "plenty of money" by one who was compelled to work his way through school, but his funds seem to have consisted chiefly of what he could earn in the summer vacations by cultivating a part of his father's farm, and it is doubtful if he had twenty dollars to spend during a school year after paying for his board, tuition and clothing. "He excelled as a debater, and in general information he ranked as the best posted man at college." He was kind-hearted and won popularity among his fellow students, as might be expected of one who was to become the idol of his political party for a generation. After a year in the preparatory department, he took the full college course of four years with the class of 1841. Being called home before the close of his last year at college by sickness in his father's family, he failed to receive his diploma with the rest of his class, but was afterward enrolled as a graduate of that year. In the absence of any record to the contrary we may assume that Thomas slept in a cold room, rose before daylight and attended morning prayers at sunrise; that he built his own fires between the hours for morning prayers and breakfast, studied

until eleven o'clock, and after morning recitations and a midday dinner, spent the daylight hours of the afternoon in study and recitations until time for evening prayers; that at the close of the last recitation, just at sunset, he attended evening prayers with all the other students, and then walked in a long procession to supper in the college dining room; that, after supper, he attended a literary or debating society, or went to a religious meeting, or indulged in the harmless mischief with which boys at school while away their idle hours. We may assume this because such was the daily round of life at that school. Hanover College was not a coëducational institution until long afterward, and his classmates were all young men. It was originally an industrial college, and was planned to afford the students a chance to pay their tuition by labor on the farm and in the workshops attached to the school. But the industrial feature was abandoned while Thomas was there.

After a year spent in the law office of Stephen Major at Shelbyville, he went to Chambersburg, Pennsylvania, and entered there the law school wherein his uncle was his instructor. Of his life at the law school we know as little as we do about his life at college. The school was a department of Gettysburg College, but was conducted at Chambersburg, twenty-five miles away, where the instructor lived. The instruction consisted of recitations from the text books studied, and practice in copying

legal papers and court records. Students were expected to answer any question relating to the text, and they often sat for hours at a time copying entries in the court records relating to their preceptor's professional work. Mr. Hendricks said of the school nearly forty years later: "Our law studies were examinations chiefly, not lectures on the law." He found time to study Shakespeare with Jeremiah S. Black, who had succeeded Judge Thomson in his judicial district. Judge Black became celebrated as a Shakespearean scholar and critic as well as eminent in law and politics.¹ Mr. Hendricks went no farther with the study of Shakespeare than the development of an enthusiasm in reading and studying the plays for his own pleasure and improvement. A lasting friendship was formed, however, between these two great lawyers. On his journey to Chambersburg, Mr. Hendricks visited a theater for the first time at Cincinnati, and before returning to Indiana, after eight months at the law school, he visited Philadelphia and repeatedly listened to Forrest, who, at the height of his fame, was appearing in Shakespearean plays.

It is said that two hundred dollars paid the expenses of Mr. Hendricks' journey, by steamboat and stage coach from Indianapolis to Chambersburg and his eight-months' residence at school, and that he had a dollar and twenty-five cents of his money left when he reached home. Being too late for the regu-

¹ See essay on, *supra*, vol. VI, page 1, Ed.

lar examination for admission to the bar of the Supreme Court, he was given a special examination by the circuit court judges, which he passed to their satisfaction, and immediately opened a law office at Shelbyville. It is not recorded whether his father added to the slender capital with which he returned from the law school, but he lived at his father's home on the edge of town while he waited for practice. The opening years of his professional career were not marked by sensational success, but rather by a steady growth in the confidence of the courts and of the people in him, as a diligent, capable and rising young man. In the meager practice of the village lawyer great amounts were not at stake, but in the preparation and trial of small cases the principles of law declared by Blackstone, Chitty, and other great masters of jurisprudence were often more clearly and ably presented than in controversies in the highest courts involving millions. To one imbued with zeal and ambition for legal eminence no trial in court is unimportant when it presents an issue of law or a question of equity. In this spirit and with this conception of his profession, Mr. Hendricks pursued his labors from the beginning.

His first law business was the settlement of a small estate. This call he owed to the clerk of the court who had recommended him to one who was inquiring for an attorney. The first trial in which he participated was before a local justice of the peace, and his fee was a treat of apples in which the magistrate,

opposing counsel, parties and spectators shared equally. Young Hendricks had the satisfaction of winning his case. Twice during his early career as a lawyer he volunteered to conduct prosecutions; once to protect the poor and oppressed, and once to protect the community in general. These two incidents have been thus related:

As he was walking to the court house, a colored man appealed to him for protection, being pursued by a burly fellow who was threatening to "teach the nigger to speak to him on the street." It was in the days of slavery in the Southern states, and race prejudice was very strong in Indiana, while the negro was denied almost all civil rights except protection from assault. The young lawyer inquired if a friendly salute was the colored man's sole offense and was answered in the affirmative. Accepting the trust imposed by the plea of the friendless negro Mr. Hendricks procured an indictment, prosecuted the offender, and lodged him in jail, all within less than two hours. Imprisonment for a simple assault and battery was almost unknown in that backwoods country, where every man was his own policeman with his friends for his *posse*. But Mr. Hendricks had called the jury's attention to the fact that an unprovoked assault on a colored man was the more to be condemned, because he dared not retaliate upon the white man, but was, in effect, a victim with his hands tied. The other instance was the prosecution of a wealthy and influential citizen who had connived at robbery, receiving and concealing stolen horses and goods. Mr. Hendricks obtained a verdict of guilty, sending the offender to the penitentiary, and though the convict secured his release on a technicality by appealing to the Supreme Court, a salutary lesson was impressed on the community.

When he first began to address juries he encountered the difficulty that young attorneys so frequently

meet, when the wish to be persuasive is greater than the desire to be elegant. It is related that an old friend who loitered about the court house one day said to him:

Thomas, I heard the speech you made yesterday and the one you made to-day. I liked your speech to-day much better. In the one you made to-day, you said "Gentlemen of the jury" only twenty-two times. Yesterday you said it forty-three times, beginning and ending one sentence with "Gentlemen of the jury."

Much practice, a liberal education, and the saving grace of good sense overcame all his early faults as a speaker until he became one of the most effective orators in the country, whether addressing the court, the jury, or the general public.

The young attorney very properly began his professional career by falling in love. When he returned from the law school to his father's home in the fall of 1843, Miss Eliza Morgan was visiting her sister at Shelbyville. After she returned to her home near Cincinnati, letters were exchanged, followed by visits of the young attorney to her Ohio home, and at the end of two years they were married. It is said that as soon as he felt sure of his ability to support a wife, Mr. Hendricks took the stage coach for his sweetheart's home, and though no preparations for a wedding had been made, they were married the next day after his arrival, and husband and wife returned to Shelbyville. They lived in a cottage in the little country village and dressed their garden with their own hands, as did all their

neighbors. The earning of a five-dollar fee by breakfasting before daylight and walking several miles on the ice through a storm to plead a case before a Justice of the Peace was an event of present moment as well as future promise. The only child, a son, was born at the cottage home in January, 1848, just before its father entered on his first political campaign. It died three years later about the time that Mr. Hendricks was first elected to Congress. At that time all the counties of the state were divided into twelve circuits for judicial purposes, and the circuit court sat at Shelbyville only for terms of a few days each season. Attorneys frequently had business in counties of their circuit other than the one where they lived, and rode from one county to another on horseback along primitive highways and over bridle paths winding through the woods. Oliver H. Smith, formerly United States senator from Indiana, in his delightful book of reminiscences, tells of lodging with an uncle of Thomas A. Hendricks during a two-day session of court at Greensburgh, and then starting on horseback in company with the circuit judges, and lawyers, for a twenty-mile ride through the woods to Shelbyville, where court was to begin on Thursday of the same week. A cold, drizzling rain prompted them to stop at a wayside tavern for whisky, after which they took the wrong path, and had to retrace their steps, reaching the Hendricks home at Shelbyville just at dusk, where they stopped during an equally

short term of court. The terms of court rapidly lengthened, as the country increased in population and wealth, and Mr. Hendricks gained a fair share of the increase in legal business. Notwithstanding his activity in politics he found time to attend the court at almost every term and his professional skill gave him employment in all the important cases tried in his county while he continued to live there, and long after he had removed to Indianapolis. His reputation as a lawyer grew every year of his life and he was for many years one of the recognized leaders of the bar, not only in Indianapolis, but throughout the middle west. He had a natural aptitude as well as a fondness for his profession.

But to understand the work of Mr. Hendricks as a lawyer, we must also understand his work in other relations. His political activities occupied too large a place in his life to be overlooked. He held public office for twenty-one years out of the forty-two years of his professional life, and was the unsuccessful candidate of his party for Congress once, for governor once, and for vice-president once, besides taking an active part in each biennial campaign when he was not himself a candidate. From the first, like many other young attorneys, he extended his acquaintance by public speaking, both at social and political meetings. He was orator of the day at a Fourth of July barbecue in his county in 1842, before he went to the law school in Pennsylvania, and after he opened his law office he was often called on

for public addresses. In these addresses he frequently discussed the political questions of the day, which included the tariff, the annexation of Texas, and the extension of slavery to the territories and newly-formed states as well as the financial policies of the state of Indiana and the subjects of internal improvements and state banking. He took no active part in politics until nominated, at the age of twenty-nine, for membership in the lower house of the Indiana General Assembly. At the time of his nomination, it is said that he had never made a political speech, but his pronounced ability as a speaker and debater brought him into prominence almost immediately, and he was elected in August, 1848, at the same time that the voters of the state declared in favor of free schools. The subject of state banks then occupied a large share of the public attention, and he and the rival candidate were jeered at as "two moneyless and clientless barristers trying to disagree on the subject of banking." In spite of this taunt, however, the successful candidate was to serve with the committee on banks at that session of the legislature, and, in the constitutional convention two years later was to exert an influence on its action on the subject of banking, the effects of which are still felt.

The most important legislation enacted during the term of Mr. Hendricks was a law providing for the support of free schools by general taxation, and putting a state officer at the head of the common school system. This act received his earnest support.

In 1850 he was unanimously selected one of the two members from Shelby County to go to the constitutional convention which met in October of that year. In the convention he took a prominent part in framing the state constitution which, with some slight amendments, is still in force in Indiana, and which has served as a model for the constitutions of many other states. On returning from the constitutional convention in February, 1851, Mr. Hendricks announced himself a candidate for the Democratic nomination for Congress, which he won only after thirty-two ballots had been taken in the convention. Elected in August, he went to Washington almost immediately afterward to discharge his duties. The session of Congress lasted until late in July, and as the new state constitution had provided for holding elections in October in the even years, instead of August in the odd years, Mr. Hendricks on his return found himself in the midst of a campaign for reelection. He had been nominated without opposition and was reelected by a large majority, the ordinary Democratic majority in Shelby County being nearly doubled.

In 1854 the agitation caused by the Kansas and Nebraska Bill and a fusion of opposing parties caused his defeat. He returned to Shelbyville to practice law. But, in August, 1855, he was appointed commissioner of the General Land Office by President Pierce, and in that capacity he returned to Washington. During the time he held the office

of commissioner and resided in Washington he was unable to practice his profession in the courts, but he and his subordinates decided more than twenty thousand contested land cases, besides issuing nearly four hundred thousand land patents. When he came to the office the work was four years in arrears; before he left it, decisions were pronounced and deeds delivered within four months after applications were received. In addition to his work as a public officer Mr. Hendricks organized a law class among the clerks of his department, and taught the class in the evenings without any charge for his services. In 1856 he temporarily returned to Indiana to take part in the presidential campaign. His presence and speeches added to his own growing popularity. Two years later he defended, by speeches, President Buchanan's administration, though he and Mr. Buchanan were seldom in accord. Mr. Hendricks resigned as commissioner of the public land office in the summer of 1859, and resumed the practice of law at Shelbyville. A year later he removed to Indianapolis. In the meantime he had been unanimously nominated by the Democrats for governor, on motion of Mr. Lew Wallace, afterward destined for many years to oppose him as a Republican while admiring him as a lawyer and friend. Mr. Hendricks and the entire Democratic ticket, state and national, was defeated in Indiana that year, and Governor-elect Henry S. Lane was sent to the United States Senate, thus leaving his lieutenant-

governor, Oliver P. Morton, to act in his place as Governor.

Mr. Hendricks now began to take a leading position at the bar. In 1862 he formed a partnership with Oscar B. Hord which continued, except as interrupted by his official duties, until the death of Mr. Hendricks. Six years of service as United States senator, four years as governor, two campaigns as the nominee of his party for the office of vice-president, and six months of service as vice-president, interfered with and sometimes suspended his work at the bar. But the intervals between his varied political activities and official duties were devoted to the active practice of law. Indiana elected a Democratic legislature in 1862. The expulsion of Jesse D. Bright from the United States senate left a vacancy which had been temporarily filled by appointment. Two months still remained to be filled by election. The representatives and senators naturally turned to the defeated candidates at the last state election for the offices of governor and lieutenant-governor. Mr. Hendricks was accordingly elected to the United States senate for the term of six years, beginning March 4th, 1863, and David Turpie, late candidate for lieutenant-governor, was elected for the remainder of Senator Bright's term.

During his six years of service in the United States senate, Mr. Hendricks continued in the active practice of the law, extending his practice to the Supreme Court of the United States. Abram W. Hendricks,

a cousin of Thomas A. Hendricks, was added to the law firm in 1866, after which the firm was known as Hendricks, Hord and Hendricks. While he was gaining an enviable position as an attorney in important cases both at home and at Washington, Mr. Hendricks was the recognized leader of the very small minority of Democratic senators. Though he opposed many acts of the Administration, he steadily supported the war, and at its close supported President Johnson in the measures which brought upon him the wrath of the Radical leaders. The Democratic state convention which met at Indianapolis in 1868 nominated him for governor of Indiana without a dissenting vote. A determined effort was made in the National Democratic convention to nominate him for President, but Senator Bright had never forgiven the slight put upon himself when Mr. Hendricks succeeded him in the United States Senate, and his determined opposition, together with the fact that his nephew was one of the delegates and the Indiana delegation in that convention could not be voted as a unit, defeated Mr. Hendricks. The opposing candidate for governor in 1868 was Conrad Baker, who was destined for many years to be his law partner. The state elections in Indiana were held in October. Mr. Hendricks was beaten by a majority of only 981 votes, though the majority for Grant and Colfax in November was ten times as great. Four years later he was again a candidate for the office of governor, and was elected by

a majority of 1,148 votes in October, while Greeley and Brown were defeated by nearly 23,000 a month later. Mr. Greeley died soon after the election, and when the electoral college met, most of the Democratic electors as a compliment voted for Mr. Hendricks.

On assuming the duties of the governor's office Mr. Hendricks retired from the law firm of Hendricks, Hord and Hendricks and was succeeded by the retiring governor. The name of the firm was changed to Baker, Hord and Hendricks, which name was continued until long after the death of all the original members of the firm.

After four years as governor, in 1876 Mr. Hendricks was nominated for vice-president on the same ticket with Samuel J. Tilden. He again carried his own state by a plurality of 6,000. The decision of the electoral college gave the presidency and vice-presidency to Hayes and Wheeler, and Mr. Hendricks retired to private life until elected vice-president eight years later. During this period he was once more a member of the law firm of Baker, Hord and Hendricks, as he had been before he became Governor, and shared its large practice in all of the higher courts. Mr. Hendricks did not lose interest in political affairs while he was practicing law, but was in frequent demand for public speeches, political and otherwise. He presided over the Democratic state convention in 1878, and again in 1880, and each time his speech as presiding officer sounded the "key

note" of the approaching campaign. He repeatedly aided his party in other states by speechmaking tours during political campaigns. His own expression was that he never expected to be out of politics while he was out of the grave.

The refusal of the Democratic national convention at Cincinnati to nominate him for President in 1880 was a severe blow. He had made the race for the vice-presidency four years before, when the people of the west thought he should have headed the ticket, and doubtless expected a grateful Democracy to place him at the head of the ticket in 1880.

Mr. Hendricks led the Indiana delegation at the Democratic national convention at Chicago in 1884, and cast its whole vote as a unit to nominate Senator McDonald for the presidency. But after Grover Cleveland had been nominated on the second ballot, the convention unanimously voted to nominate Mr. Hendricks candidate for vice-presidency. He was elected, and upon taking his office, March 4th, 1885, he again severed his connection with the law firm of which he had been a member for so many years. His active duties as presiding officer in the Senate would not begin until Congress should assemble in December, however, and during the summer and autumn he was frequently at the law office, which was less than five squares from his home. His death, November 24th, 1885, at the age of sixty-six, prevented him from actively assuming the official duties of his new position except for the brief executive

session which followed the President's inauguration, so that his last work was really done as a lawyer, rather than as a public officer.

Only once during his entire political career did he encounter any pronounced opposition within his party in his own state. His first nomination for Congress in 1851 was gained, as we have stated, only after a hard struggle against many opponents, thirty-two ballots being required to decide the contest. But all of the many nominations he received, with this one exception, were either unanimous, or with but few dissenting votes. While he tried in vain three times to be nominated for the office of president, he never asked a nomination at the hands of the Democrats of Indiana and failed to receive it. And two national conventions which refused him the nomination for the presidency chose him by acclamation as candidate for vice-president. Being a man of kindly disposition and good heart, Mr. Hendricks was a past-master in the art of winning votes. On one occasion when he was a candidate for Congress he was riding on horseback to the place where he expected to address a political meeting. The country was covered with thick woods, which have since been cleared in opening for settlement one of the finest farming districts in the world. He saw a man in a small "clearing" near the road trying in vain to roll a log to the top of a pile which he was getting ready for burning. Dismounting, he helped to roll the log into place, and continued on his way without

disclosing who he was. But the man he had helped recognized the speaker at the next political meeting he attended, and with three other members of his family, all Whigs, voted for the Democratic candidate who could be so kind as to help a neighbor, and so polite as not to take advantage of his gratitude by asking for his vote after helping him.

It is unfortunate, perhaps, that there are so few incidents in the life of a lawyer which seem to him and his contemporaries worthy of recording. A record is made when pleadings are filed and when judgments are entered. But it does not appear which of the several attorneys in the case drafted the one or procured the entry of the other. The examination of witnesses is recorded only in bills of exceptions framed to disclose the merits of the controversy rather than the merits of the lawyers who tried the case. A few anecdotes passed from lip to lip, or printed in the personal recollections of an old inhabitant, supply the place of history. But anachronisms and known errors often throw doubt upon stories of this kind that otherwise appear well authenticated. The professional career of Thomas A. Hendricks is no exception to this rule. Much has been said and written about his career as a statesman and politician, but what we know of his practice at the bar may be stated, briefly. Though the fact is well known that he was employed in many of the leading cases of his time in both the state and the United States courts, not many of the particular

cases in which he participated can now be designated. Neither is it known what part he took in them. In the case of the Water Works Company of Indiana vs. Burkhart,² Mr. Hendricks, together with O. B. Hord, A. W. Hendricks, A. G. Porter, Benjamin Harrison, C. C. Hines, S. E. Perkins, and S. E. Perkins, Jr., represented the appellants against J. Hanna, F. Knefler and B. K. Elliott for appellees. This case involved the right of owners of land through which a canal ran, to cut ice from such canal, the state having appropriated the right of way for same and having duly compensated the owner for such right of way.³ In what is known as the "Beaver Lake" case,⁴ Mr. Hendricks successfully championed the rights of riparian owners to the bed of a non-navigable lake. *Williar vs. Irwin*,⁵ is a leading case in both state and United States courts regarding the validity of contracts between parties dealing in "margins" and like gambling. The right of two competing telegraph companies to a way over a single and particular railroad right of way is decided in a case in which Mr. Hendricks took part, reported in the 7th volume of Bissell's United States Circuit Court Reports.⁶

One of his strong points as an advocate was the

² 41 Indiana Supreme Court Reports, 364.

³ Another of Mr. Hendricks' cases which involved a similar question of right to a canal way will be found in 11 Bissell's Reports, 13; affirmed in 103 United States Reports, 599.

⁴ 11 Bissell's United States Circuit Court Reports, 197.

⁵ 110 United States Reports, 499.

⁶ Page 367.

power to adapt himself to the jury and present his argument in words that would appeal to individual jurors. As most of the jurors in his day had lived in the country when boys, and a great proportion of them were called from their farms to the jury box, he made free use of illustrations drawn from the fields and woods, and the common facts of farm life. But if a man from another walk of life was on the jury, the argument would be molded to appeal directly to him, also. Once he was defending an editor who, in the presence of witnesses, had shot several times at a personal enemy, but had escaped the guilt of homicide by his bad marksmanship. The editor had said in his paper so much against the defense of "emotional insanity" as a ground for acquitting criminals, that his attorneys hesitated to rely on that plea, but there was no other possible defense for a man whose criminal act could not be denied. Among the jurors was a former ship-carpenter, a positive, combative individual, who would probably bring the jury to his opinion, or prevent the return of a verdict. Leaving the examination and cross-examination of witnesses to his associates, Mr. Hendricks set about preparing an argument in which he likened the human mind to a ship. The arrangement and use of all the intricate mechanism of cordage and sails, compass, wheel and rudder were minutely described, and the jury were reminded how the smallest mishap of a knotted rope, or torn sail or broken spar might cause the ship to veer momenta-

rily from her course, with unpreventable damage to herself or other vessels lying in her path, and a moment later, the defect cured, she would hold her course as firmly as if she had never turned aside. And so, he argued, a lesion of the human brain might cause a man to do an act which he would have shunned with horror a moment before, would be incapable of committing a moment afterward, and would not consciously intend at the moment of its commission, any more than the pilot consciously intends the helpless plunging of his ship when its rudder chains break. His argument was presented with such an air of deference to the superior knowledge of the ship carpenter that the carpenter's breast swelled with conscious pride and the parallel was so well drawn as to convince the jury that a man who was one of the cleverest editors in the state might actually be able to get out his paper in the morning, attempt to shoot an enemy before night, and be ready for his editorial duties the next day, and yet be excused as a raving maniac when the shooting was done.

The unruffled calmness with which he met disconcerting events in the course of a trial was illustrated when he was defending a man charged with embezzlement. The funds charged to have been diverted had come into the defendant's hands many years before, and the defense most relied on was that the statute of limitations had run against the prosecuting witness before he demanded the return of his

money. But the question remained whether the six-year statute or the fifteen-year statute applied, and the defendant's attorneys had asked the judge to instruct that he could not be convicted unless it was proved that the prosecuting witness demanded his money within six years after the defendant became liable for it. While Mr. Hendricks was in the midst of his argument on another point his associate counsel was called to the desk by the presiding judge who told him the court would instruct the jury that the claim was not barred by the shorter period of limitations. This was communicated to Mr. Hendricks when he paused for a drink of water. As undisturbed as if he had been told merely a common place fact, Mr. Hendricks finished his argument on the point under discussion, and then began a discussion of the powers of the jury. He reminded the jurors of their right in a criminal case, to determine the law as well as the facts, told them the court would instruct that the six-year statute of limitations did not apply in that case, and launched upon an argument to convince the jury that such a view of the law was erroneous, and that they ought to exercise their high prerogative to decide the law contrary to the opinion of the court as declared in its instructions. The defendant was acquitted, and the jurors said they were agreed that the six-year statute had barred the claim of the prosecuting witness before he asserted it notwithstanding the court's instruction to the contrary.

A story which illustrates the kindness of Mr. Hendricks toward younger men of his profession, and his unwillingness to take their place, is told by the Honorable Addison C. Harris, formerly United State Consul to Austria. The story as told by Mr. Harris is as follows:

I came to the bar while Mr. Hendricks was a Senator. I was employed by a client to bring a suit against the City of Indianapolis, which involved some of the new questions of law and facts under the statutes of Indiana. The case was about ready to be called for trial when my client said to me that Mr. Hendricks had formerly been his attorney and that he would like to have him take part in the trial, to which I agreed, and at once I sent for Mr. Hendricks and explained the facts of the case. When the case was called Mr. Hendricks said to me: "I have been away from the city and you are better acquainted with the jurors than I am, and if you will select the jury, I will make the opening statement." Just before we were ready to make the statement, he leaned over the table and whispered to me, "I have not the facts and details precisely in my mind, so you make the opening statement, and I will examine the witnesses." I made the opening statement. When we were ready to call the witnesses, he said that I knew the witness better than he did and for me to examine the first one and he would examine the next. I examined the first witness and when we came to the next he said, "I wish you would examine this witness and I will cross-examine the defendant's witnesses." I did, and when we came to the argument, he said again, "I wish you would make the opening speech to the jury, and if the defendants make a statement, I will close the argument." The conduct of my case was thus left entirely to me. Mr. Hendricks was a Senator and stood in the first ranks of the Indianapolis Bar, while I was a stranger wholly unknown at that time to either Court or jury. This kindness on his part created an impression on me that I will never forget.

During his first race for governor, in 1860, it chanced that the opposing speaker at a joint political debate at Rockville, Indiana, was unable to attend and Benjamin Harrison, then, as he called himself, a very young man, and the Republican candidate for Reporter of the Supreme Court was sent to the place. Mr. Hendricks spoke first and when he had concluded asked his friends to remain and listen to his antagonist, whom he complimented on his "youthful performance" at the close of his speech with such kindness that it was recalled with gratitude by Mr. Harrison twenty-five years later, when, as a member of the United States Senate, he took part in the memorial services after the death of the Vice-President.

At the same time that Mr. Harrison related this incident William M. Evarts, then United States senator from New York, declared that when he was first opposed to Mr. Hendricks in the trial of a case twenty years before, having been called from New York as Mr. Hendricks was from Indianapolis to assist in an important law suit at Cincinnati, Mr. Hendricks was regarded on his own side as the leader of that array of eminent counsel, and by his opponents was felt to be the most formidable and most competent contestant. And that afterward, when a minority of twelve Democratic senators opposed thirty-five Republican senators during the trial of the impeachment proceedings against President Johnson, Mr. Hendricks was relied on by his side of the senate chamber for his wisdom, his courage, his

ability as a lawyer, his learning and his experience in constitutional debate. Mr. Evarts said:

I think now, as I thought then, that among the eminent men who took part in the preparation and delivery of opinions, and those who took part in the debates, not infrequent, of an interlocutory nature, no man appeared better in his composure of spirit, in his calmness of judgment, in the circumspect and careful deliberation with which, avoiding extravagances, he drew the line which should mark fidelity to the Constitution, as distinguished from addiction to the supremacy of party interests and party passions.

Governor Hendricks was a great favorite in the United States Court because of his high professional standing and almost exquisite manners. On one occasion a man was being put on trial for violation of the election laws in relation to choosing members of Congress. When the jury was made up and about to be sworn, Mr. Hendricks rose and, dropping his head slightly to one side as was his wont, said to General Gresham, who was sitting as United States District Judge: "Of course your Honor must be aware of what will be the outcome in this case." With a flushed face, General Gresham inquired: "What do you mean?" Mr. Hendricks replied:—"I mean this is a political case and my client is a Democrat and everybody knows it, and, as I am informed, ten of the jurors are Republicans." At once General Gresham called the court officer and asked if such was the case. "Yes, sir," was the reply. "Have you selected Republicans only, for the jury?" "Yes, because I thought we ought to have

a jury of men who shot right in the war." The judge instantly said, turning to the jury: "It is no reflection on you, but it shall never be said, that while I am upon the bench in a political case that the defendant has been tried by his political opponents." General Harrison, who was then aspiring to be United States Attorney, became very indignant, and criticized the action of the Court. Thereupon the Judge ordered that a writ be issued summoning a new jury, and calling one of the bailiffs, ordered him to select twelve of the best men of Indianapolis, one-half Republicans and one-half Democrats. The prisoner was convicted.

Governor Hendricks was a fine examiner of witnesses. He understood human nature and had a sweet confiding way of putting questions without raising any suspicion in the mind of the witness he was examining. He always put himself on the level with the jury. When coming to the very point and crisis in his argument, he would come close to the panel and bending toward the jury, say in very low tones: "Now Jurors, isn't that right?" and more than once the jury have nodded in assent. The last jury case in which he appeared was a case involving title to valuable lands, and required some four weeks to introduce the evidence. When he came to the argument he used no notes except simply catch words on a scrap of paper lying before him. His address was four hours long, full of power and aggressive argument, and won. He often resorted to a kind of

indescribable quaint humor in his address to the jury. His cousin, Abram W. Hendricks, was a most exemplary book lawyer and Governor Hendricks relied upon him to furnish him with the authorities. Given a premise on which to stand, Governor Hendricks reasoned, in an address to the Court, with singular clearness and force.

In the Memorial Bar Meeting at Indianapolis, Senator Turpie said:

His deportment toward his brethren of the bar, the jury, his auditors, and especially toward the presiding judge was the model of courtesy and complaisance. As an advocate he was entitled to high rank. He was especially able in adaptation. Fact was fitted to fact, and the whole structure of circumstance dovetailed into the law of the case. To skill in presenting the facts he united a suave plausibility which made the most of little when little fell to his side. He had great command of familiar terms and expressions, which became his interpreters to the jury, aided by a voice of great persuasive power. His imagination was strong, active and vivid; and he knew when to use it and when to forbear. He was strongest in causes involving life, personal freedom, or vindication of character, and upon questions of conduct, either public or private. His name was a synonym for professional honor, courage and fidelity. As a member of the bar of his county, his state and the nation, he was held in the highest esteem.

In the Memorial Meeting of the United States Senate, Senator Voorhees said:

He was never so strong, so magnetic and so irresistible as when under assault or crowded in discussion by an able antagonist. His qualities for such an ordeal were of the highest order. A self-possession never for a moment disturbed, a mental concentration

no excitement could shake, a memory of facts never losing its grasp, a will which never faltered, and a courage which rose in the presence of danger as certainly as the mercury in the tube under heat, were all his. Added to these gifts and acquirements was a voice rich, musical and resonant, pealing forth at his pleasure like a bugle call to action, or modulated into soft, seductive notes of the flute, wooing the affections. A highbred, classic face of singular manly beauty, lit up by a winning and genial expression, a large head with the contour and poise of an antique model, completed a picture which was never beheld by an audience without emotions of delight.⁷

To-day in the State House Square, in Indianapolis, there stands to the memory of his greatness a magnificent bronze statue which shows the esteem and appreciation in which he was held by the people of Indiana.

In Indianapolis, and the state at large which, during his life had a bar noteworthy for legal and forensic accomplishments, no man was more successful before a jury than Mr. Hendricks. And, in the language of Mr. W. D. Bynum, speaking in the House of Representatives after the death of Mr. Hendricks:

Indiana has given to the country a galaxy of most brilliant men, but in all that makes men great Thomas A. Hendricks will pass into history as the peer of any who preceded him. While he may not have possessed the diction of Hannegan, the fire of Dunn, the magnetism of Willard, the rhetoric of Lane or the logic of

⁷ In the same memorial meeting Senator Spooner said: "He was a genial, gracious, kindly gentleman, who treated all that came within the circle of his influence, rich or poor, exalted or lowly, with the same rare and exquisite courtesy."

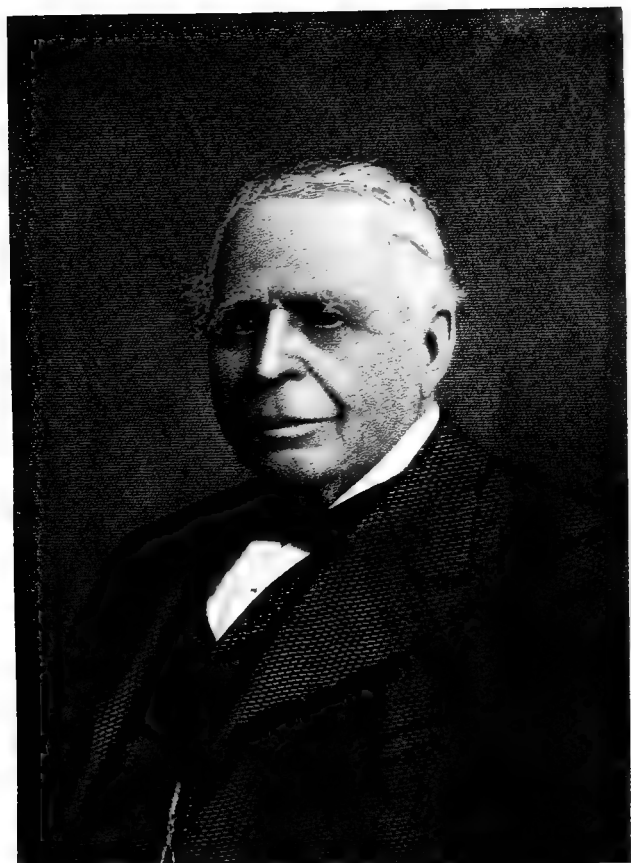
Morton, he combined all these gifts in a high degree, which, coupled with his great moral powers, make him a colossal figure in the history of Indiana, and place his name in the list of great men of the greatest nation.

He was a model that any student of highest ambition might adopt, the bar of any state be proud of, and the courts of any country welcome to its forum.

JAMES OVERTON BROADHEAD.

JAMES OVERTON BROADHEAD

From an engraving executed from a photograph, taken when Mr. Broadhead was about seventy-six years of age.



JAMES OVERTON BROADHEAD.

1819-1898.

BY

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IT is the consensus of opinion among the people of Missouri, including the bench and bar, that James Overton Broadhead was one of the very foremost lawyers. He was a statesman of high order, and an upright and patriotic citizen of the first rank.

He was a Virginian by birth; born on May 29th, 1819, near Charlottesville, Albemarle County. His father was of English, and his mother of Scotch, origin. His father was a captain in the War of 1812, and for many years Surveyor of his county. His mother was by marriage related to Jefferson, and by blood to Patrick Henry. As has been said by another:

Thus it will be seen that he sprang from a strong and sturdy race of people. He was fortunate as well in the place of his birth and his early surroundings. He was born at a time when many of those who founded the Republic were still living, and in a community where a number of them resided. First and foremost was Thomas Jefferson, who looked down from the heights of Monticello upon the village home of the Broadheads, by which he al-

most daily rode on his way to supervise the building of the University, the absorbing object of his declining years. Next was Mr. Madison, the "father of the Constitution," whom he said he had often met and talked with. Another familiar figure in the village streets was Mr. Monroe, and a few miles distant was the birthplace and early home of George Rogers Clarke, the conqueror of the Northwest. In the southern portion of the county lived Andrew Stevenson, Speaker of the House of Representatives and Minister to England, whilst in the northern portion was the home of the gifted William C. Rives, an eminent figure in the United States Senate when that body was filled with giants, and afterwards the accomplished diplomat, as Minister to France.

Broadhead received a very thorough instruction in English and the classics at the school of his maternal uncle. At the age of sixteen, he entered the University of Virginia, where he remained a year, supporting himself there by his work as tutor.

His father moved to St. Charles County, Missouri, in 1836, and a year afterwards James followed, having in the meantime, been a tutor in Baltimore, Maryland. After reaching Missouri, he became acquainted with Honorable Edward Bates, one of the leading lawyers of the day, who then lived in St. Charles County, and was afterwards Attorney-General under President Lincoln, and Broadhead became tutor in that family and read law under Bates.

He was admitted to the bar in Pike County, Missouri, in 1842, and resided and practiced there and in the surrounding counties until 1859, when he removed to St. Louis, where he lived until his death, August 7th, 1898. Pike County is famous in story

and song throughout the west, and he was always proud of his residence there, and the people were ever his devoted friends, and of the memorial exercises after his death, one of the largest and most affecting was held at Bowling Green, the county-seat of the old county. From the first he was splendidly equipped for the practice of his chosen profession; a solid education; a mind trained for study; a clear conscience; practical, not visionary, views; indomitable courage; a generous heart; he was devotion itself to the jealous mistress of the law, ever holding its loftiest precepts in mind.

Whatever may be thought now, there can be no doubt but that the method pursued by him in preparing himself for the practice was the best of the generation and place in which he came to the bar. His law preceptor was one of the ablest lawyers of the time, actively engaged in the profession, and he took a special interest in his tutor, and the preparation Broadhead received was better than could then have been given in a law college. The jurisprudence of Missouri was young. Only seven volumes of the Missouri Supreme Court Reports had been published. There are now one hundred and eighty-nine volumes of the Supreme Court Reports and one hundred and eleven volumes of Missouri Courts of Appeal Reports. The Supreme Court of the United States had then published only to the first Howard, and there were no official reports of the Federal Circuit or District Courts in the west. The

separate common law and equity systems of practice prevailed. His preceptor was acquainted with the English system, its reports and elementary writers; he knew, as familiar friends, all the decisions of the Supreme Courts of the United States and of Missouri; and had a general knowledge of the reports of the American states. All of these were indoctrinated to the young student, who had, in common with the strong men of his time, and to a greater degree perhaps than any of them, a sound mind in a sound body, and in every respect was a wholesome man.

Broadhead's fundamental education seems to have been such as to have specially equipped him for beginning the practice at the time he did. He was possessed of a broad knowledge of the principles of the law, and his mind seemed to be so constituted that when a given subject arose for his consideration, he would always start right in its investigation. If it were a question of general law, after resolving and formulating, he would inquire, what was the common law on the subject? What does equity jurisprudence have to do with it? What was the civil law? Has it been ruled on by the English courts, or the Supreme Court of the United States, or the superior courts of the older states of the Union, or of Missouri? What has been said on the circuit about it? What do the lawyers think of it? If the question pertained to constitutional law, where is the authority for the act? What provision of the Federal Constitution authorizes or prohibits it? What pro-

vision of the State Constitution bears upon it? His mind never moved on technical lines, and he rarely, if ever, mistook the proper sources of inquiry.

Broadhead, from the beginning, took rank with the best lawyers of his bar, and rapidly acquired a good practice. He traveled the circuit, and his practice was what was known then and since as a country practice, and at that time, at least, there was none better for the development of a lawyer in the broadest sense of the term. He tried cases before arbitrators, justices of the peace, county courts, circuit courts, and in the Supreme Court, and met everywhere intelligent and vigilant adversaries. Jury trials, in which he took a large part, attracted most attention, and were generally in the presence of large crowds, who came to hear the lawyers speak.

During the period in Missouri when Broadhead was riding the circuit, it was not considered a departure from the paths of the profession for lawyers to engage actively in politics. He was what was known as an old-line Whig, the minority party in the state; yet he was sent as a delegate to the state Constitutional Convention in 1845; elected a member of the House of Representatives from Pike County in 1847, serving two years, and a member of the State Senate from Pike and Ralls counties in 1851, serving four years.

In 1847 he married Miss Dorsey, a daughter of Colonel Dorsey, a member of one of the prominent families of Pike County. When he moved to St.

Louis, in 1859, he formed a copartnership with Fidelio C. Sharp, who came to St. Louis from La-Fayette County in the western part of the state, and from the start the firm of Sharp & Broadhead, which continued unbroken until the death of Mr. Sharp in 1875, had one of the largest general practices in the city and state. Afterwards he was associated in the general practice in St. Louis with John H. Overall, W. F. Broadhead, his brother; A. W. Slayback, Herman A. Haeussler and C. S. Broadhead, his son. He remained associated with Mr. Haeussler and his son until his death.

When the war broke out, Broadhead took an uncompromising stand alongside of General Francis P. Blair, Samuel T. Glover and others, for the Union, and opposed all movements looking to secession. He was appointed a member of the Committee of Safety in St. Louis in 1861, before which committee he argued in support of the right of the Federal Government to call out the state militia to suppress insurrection. He was a delegate in that year to the convention which met to determine whether the state should remain in the Union or secede, and his strong voice was for the Union. He was appointed District Attorney of the United States in 1861, which position he shortly resigned, and was commissioned, in 1863, Lieutenant-Colonel of Volunteers by President Lincoln, and was immediately appointed Provost Marshal General of the Military Department of Missouri. In speaking of his attitude at the com-

mencement of the Civil War, Mr. Henry T. Kent, of the St. Louis Bar, at a meeting held in Pike County after Mr. Broadhead's death, said:

Looking back after more than three decades have elapsed, with the prejudices of that stormy period eliminated, I think he presented at that hour an heroic figure. Knowing his love for his kith and kin, for the associations and friends of his youth and manhood, and seeing most of them siding with the South, it was no easy task to face their taunts, to hear their words of disloyalty to the people amongst whom he had been born and lived (for what stronger ties than those of blood and society), yet he would not have been the Broadhead we have known, had he hesitated a moment to take the step whither conviction and duty pointed the way.

When the war was over, he aligned himself with the Democratic party, and opposed proscriptive features of the Drake Constitution of 1865, and stood, with Blair, Glover, Schurz and others, for the re-enfranchisement of the southern sympathizers, which was accomplished in the memorable campaign of 1870, when B. Gratz Brown was elected Governor by a coalition of liberal Republicans and Democrats. It was to him that General Blair addressed the famous letter, which was read at the Democratic national convention of 1868, advising that the Democratic party take the position that the reconstruction acts of Congress were unconstitutional, revolutionary, null and void, and pledge its nominee to the overthrow of the state carpet-bag governments in the south. This letter, as is well known, led to the nomination of General Blair for Vice-President on the

Democratic national ticket, as the associate of Horatio Seymour for President.

He was elected delegate to the Constitutional convention of 1875, composed of the ablest lawyers and statesmen of Missouri, and was one of the most conspicuous and influential figures in that Convention. Mr. Justice Miller, of the United States Supreme Court, afterwards, in speaking of the constitution framed by that Convention, said it deserved the eulogium which Gladstone had applied to the Federal Constitution, as "the wisest instrument ever struck off by the brain and purpose of man at a given time."

He was special counsel for the government in the celebrated Whisky Ring cases, tried in the United States Court at St. Louis in 1876, and took part in the prosecution of Babcock, General Grant's private secretary. It is an open secret that had Tilden been inaugurated in 1877, Broadhead would have been appointed Secretary of the Treasury. He was chosen the first president of the American Bar Association, at its formation in 1878. He was elected to the Forty-eighth Congress in 1882, where he served on the Judiciary Committee. In 1885, President Cleveland appointed him special commissioner to examine into the French Spoliation Claims, which necessitated a journey to France and his presence there for several months, and upon his return he made a comprehensive report relative to those claims, which ever since has been regarded as the basis for their consideration and adjustment. President Cleveland also appointed

him United States Minister to Switzerland in 1893, where he remained about two years. In 1896 he allied himself with the Gold Democrats, attending the Indianapolis convention, and was an influential factor in framing its platform and directing its proceedings. He was professor of International Law in the St. Louis Law College from 1896 until his death.

It might seem, from the many public positions which he held and the time he devoted to official duties, that his attention was withdrawn from the activities of the bar. Nothing could be farther from the fact. His mental constitution was such, and he was so thoroughly grounded in the law, that at all times his mind was upon it. When in the military service he was more of a judge and a lawyer than soldier. When in the legislative halls, he treated all questions, and specially those touching the federal or state constitutions, in a lawyer-like statesman's way; while in the diplomatic service he never ceased to view things from the standpoint of a lawyer. The various offices he held and the part he took in politics seemed not to distract but to enlarge his vision touching all legal subjects. Doubtless the most active period of his professional life, so far as concerned the continuous, almost daily, trial of cases, was during the period when he was a member of the firms of Sharp and Broadhead and of Broadhead and Slayback, extending from his removal to St. Louis to Slayback's tragic death in October, 1882. However his personal time might be occupied by duties of state,

these law offices were always going concerns, and his mind kept in touch with their business. In the olden days in St. Louis there were no busier men than the members of the leading law firms. The law business was enormous; the age of stenographers and typewriters had not come, and the manual as well as the intellectual work in the preparation and trial of cases devolved on the members of the firm, and was not organized, systematized or developed as in a later day. The rivalry and antagonism between the leading firms was intense; not, indeed, in the vulgar race for business, but from the higher motive to excel and prevail in the contests in the courts. In this life and practice, Broadhead was in his element, trying case after case, passing from court to court, ranging through law libraries, consulting with brother lawyers, advising clients, and at all times and places bearing himself with easy dignity, strength and power. The results of his work in this immediate connection were perhaps the most important of his life, though now resting largely in the traditions of the bar, and scattered through the records and reports of the courts. His practice was very large in the United States Circuit and District courts. He appeared in the State and Federal appellate courts in a multitude of cases. In presenting the memorial of the St. Louis Bar upon his life and character to the United States Circuit Court, the writer, speaking of his relations to the Federal Court, said:

He was an active practitioner in this court long before any

of the now living Judges of any of the Federal Courts assumed their judicial functions. His career at the bar spanned more than a half century. He was here when Justice Catron rode the circuit and during the larger part of the judicial administration of Judge Wells. He saw Justice Miller appointed, and was here during all the time that great judge ruled and reigned. He was here when Treat ascended the bench, and was a continuing witness of the labors of that excellent and just judge until he retired to a well deserved rest from the toilsome exactions of his double duties in the Circuit and District Courts. Broadhead was here before the Congress of the United States provided for Circuit judges. When Judge Dillon adorned and illumined this bench he was almost constantly at this bar, and was here during the whole mild, thoughtful and beneficent ministration of Judge McCrary. He saw Judge Brewer preside here and pass to the Supreme Court, there to enroll his name among the eminent judges of the century. Broadhead had been in the full tide of practice here long before Caldwell took charge of the Federal District Court of Arkansas, and was here when that able judge came to this court and put his armor on and lifted his visor as a circuit judge. He saw Judge Sanborn come fresh from the bar of the Northwest and take his place upon this bench. He was here before Thayer was elevated to the state bench, and witnessed his appointment as United States District judge, rapidly followed by promotion to Circuit judge. He contributed to the creation of the Federal Circuit Court of Appeals, and saw the judges of that court assume their judicial robes, and was spared to see its judicial duties administered by its present wise triumvirate of judges, who have, however, fortunately not ceased to be judges of the Circuit Court. He saw Priest (whom he was wont to call one of his boys), come here, receive his judicial christening and go back to the activities of the bar. He was here to welcome and approve Judge Adams' renewal of a former voluntarily interrupted judicial career. Always a friend of the Federal courts, yet ever insistent that they should be kept within their constitu-

tional moorings, in his declining years he was personally profoundly gratified (as I happen to know), that this historic court was under the judicial and judicious guidance of Judges Brewer, Caldwell, Sanborn, Thayer and Adams. As a patriot, the old man was proud of and loved his country; as the Nestor of the bar, he respected, honored and was proud of her judges. His relations to this court and its bar were entirely kindred to those he bore to the bench and bar of this state and of adjoining states and of the Union.

A leading case decided by the Supreme Court of Missouri in 1879,¹ was that of the City of St. Louis vs. The St. Louis Gas Light Company. It excited the profoundest interest in St. Louis and throughout the state. The strongest lawyers in the state were ranged on either side of the controversy. It involved the question whether or not the city of St. Louis was authorized under its charter and that of the Gas Light Company, to enforce the purchase of the plant and properties of the latter company and enter upon the era of municipal ownership of the lighting of the city. The decision of the lower court was favorable to the city, but on appeal was reversed. Broadhead's argument on behalf of the appellant was conceded, at the time and ever since, to have been one of the most masterful ever presented in the history of the state. The tide of public and professional opinion was largely in favor of the city, and this seemed to have incited the advocate to a herculean effort. Those who heard him described him as a lion at bay, and by his tremendous logic, reason and

¹70 Missouri Reports 69.

eloquence, he bore down all opposition. His brief, filed in connection with his associates, gives no adequate conception of the argument which he presented. He planted himself upon the doctrine of vested rights resulting from a series of compromises between the city and the Gas Company, arraigned the attitude of the city as that of repudiation, and bore the cause of his client to a triumphant end.

One of his greatest professional successes was in the Express Company cases, argued in 1885 and decided in 1886.² These cases had excited the greatest interest throughout the country. They had been decided in three of the United States Circuits adversely to the railroad companies. There was an imposing array of counsel. Mr. Clarence A. Seward, Mr. George F. Edmunds, and Mr. John A. Campbell, a former judge of the Supreme Court of the United States, represented the express companies. Broadhead was called into the case in the Supreme Court, and made the concluding argument on behalf of the Railroad Companies, which lasted for two days. All who heard it pronounced it one of the great arguments made in that court. Mr. Justice Miller on the circuit had led the way, holding that the railroad companies were under the obligation to permit the express companies to carry on their business on the railroads, though the railroad companies refused to contract with them, and had entered a decree enforcing by mandatory injunction the right of the

² 117 United States Reports, 1.

express companies. The general popular impression was that the express companies had the case. The opinion was based upon the principle that the express companies had the right to take their business upon the railroads and compel the furnishing of places in the cars and stations of the railroad companies to enable them to transact it, and that the railroad companies refusing to agree, the court would fix a just measure of compensation. The view of the complainants and the court below was that the railroad companies rested under the same obligation to carry the business of the express companies as to carry passengers or freight for individuals or corporations. Broadhead drew the distinction between the obligation of a carrier to carry the property of express companies as it did that of any other shipper, and its duty to transport the servants and agents of the express companies with the property, specially setting aside space in the cars and the stations for the use of their business. In other words, the proposition which he amplified during his long and able argument, was that the railroad companies were not by their vocation, and had not been made by the common law or any legislation, carriers of common carriers. His view was adopted, Mr. Justice Miller and Mr. Justice Field alone dissenting, Mr. Justice Matthews not sitting, and after the decision by Chief-Justice Waite was read, it seemed so plain to everybody that the profession has since hardly been able to understand how the lower courts reached their

conclusion. Broadhead won the encomiums of the court that tried the case, the bench and bar of the country, and his associate and opposing counsel. He afterwards stated, with most becoming modesty, that, in view of the circumstances and surroundings, three justices of the Supreme Court having decided on the circuit in favor of the express companies, and considering the eminent array of counsel against him, he rather thought that was his best effort before the Supreme Court.

In the great cause of the United States vs. The Mormon Church,³ he appeared for the Mormon Church. The United States sued under certain acts of Congress to forfeit and escheat to it the vast properties and revenues of the Mormon Church, which had, through the course of many years, accrued under its charter. He contended for the doctrine of the Dartmouth College case, claiming the charter to be irrevocable, and denied the doctrine of escheat as properly belonging to the jurisprudence of the United States. The legislation of Congress was directed against the Church on account of its polygamous tendencies, and the great weight of public opinion throughout the country was radically in favor of tearing up polygamy root and branch. The court by a majority of the judges, Chief-Justice Fuller, Mr. Justice Field and Mr. Justice Lamar dissenting, decided against the Church, holding the power of Congress over a charter granted by a legislature

³ Reported in 136, 140, and 150, United States Reports.

of a territory to be omnipotent, and overruled Broadhead's contention that a charter granted by a territorial legislature was under the same constitutional protection as a charter granted by a state of the American Union. Such a powerful plea, however, did he make against the confiscatory nature of the proceeding, that the court, in the end, so framed its decree as to provide for a modification by Congress of the disposition of the property, and Congress, by a subsequent act, so provided, with the result that the great body of the property was restored to the Church for the payment of its legal and equitable debts, for the relief of the poor and distressed members of the Church, for the education of the children of such members, and for the building and repair of houses of worship for the use of the Church, but upon the express condition that the rightfulness of the practice of polygamy should not be inculcated. It was in the course of his argument in this case, that the court interrupted him and the following colloquy occurred, which illustrates both his power of argument and the esteem in which he was held by that tribunal:

The Court: Conceding that that part of the statute is valid which declares this corporation called "The Church of Latter Day Saints" is dissolved, what do you say becomes of it?

Mr. Broadhead: That is the question I am undertaking to discuss.

The Court: You are stating these leading authorities. I would like to know what your view is; where you are coming to? What do *you* say?

In the memorial prepared by the members of the St. Louis bar upon the life and character of Broadhead, speaking of this incident, it is said:

We believe there can be no higher encomium given to a member of our profession than that the highest court of the land, in a case involving so great a question, should place itself upon record as desiring, in addition to leading authorities, the individual opinion of counsel on the vital issue of the case.

The view which Broadhead gave to the court, in answer to its inquiries, was, that if the charter had been forfeited and the corporation was non-existent, then its properties were a trust fund belonging to the individual members composing the Church, which was not far from the ultimate view adopted by Congress and the final decree of the court, with, however, the prohibitory provision, that it should not be used in any way to encourage, promote or preserve the system of polygamy. Of course, Broadhead made no sort of defense,—for Christian man as he was he could not,—of polygamy itself. It was in the course of his argument in this case that he used the following oft quoted and ever memorable words:

There is a law that does not change; the law of the land which recognizes the doctrine that no person shall be deprived of life, liberty or property without due process of law. That is unchangeable and eternal. It qualifies the authority of legislators, it limits the jurisdiction of courts; it stands as a sentinel to guard against the approach of arbitrary power over individual liberty everywhere throughout this land. Whencesoever it came, whether from the barons of Runnymede or from the forests of Germany, or from the teachings of Greek philosophers of an early age, it has

found its way here and in this country it has become the foundation stone of our political fabric.

During the early part of the year 1898, Broadhead suffered from failing health, but nevertheless continued in the practice of his profession and his work as Professor of International Law in the St. Louis Law School until the early summer. When the Spanish-American War broke out in the spring, he was among the first of his fellow citizens to unfurl the old flag over his house, attesting his devotion and loyalty to his country, and it was still flying there at the time of his death. During the summer, he spent most of his time at home, though he was still able to be about occasionally. On July 15th he was seized with a severe chill which confined him to his bed until his death. He died at his homestead, on La Fayette Avenue, St. Louis, surrounded by his wife and children, on August 7th, 1898, and his remains rest in beautiful Bellefontaine Cemetery. His last days were peaceful, and he met the final summons like a Christian philosopher.⁴

⁴ Following Broadhead's death, on August 9th, 1890, the St. Louis Bar met and appointed a committee composed of Henry T. Kent, James L. Blair, John W. Noble, Melvin L. Gray, Frederick W. Lehmann, Herman A. Haeussler, Truman A. Post, John H. Overall and Amos R. Taylor to draft fitting resolutions, and in view of Colonel Broadhead's long and eminent career at the bar and in public life, the committee asked time to prepare an appropriate memorial, and on November 12th, 1898, the memorial prepared by the committee was presented to the bar and adopted; and subsequently this memorial was presented by addresses to the United States Circuit Court of Appeals by Hon. G. A. Finkelnburg, to the United States Circuit Court by the writer, to the Supreme Court of Missouri by Hon. Henry Hitchcock, to the Mis-

Broadhead ever stood for the supremacy of the law.

He once said: "The fabric of civilized society is supported by the pillars of the law," and that law "should be founded on the principles of eternal justice as dictated by the consciences of men chastened and strengthened by the precepts of divine law;" and further, that "the subversion of the law in any case, except where its enactments become so universally burdensome as to justify revolution, takes away from every individual the only security he has for the protection of his rights of person and property."

While steadfastly upholding the majesty of the

souri Court of Appeals by Given Campbell, and to the St. Louis Circuit Court by Hon. Chester H. Krum; and, after appropriate responses by the Judges of the Courts, was ordered spread upon the records of the several courts. These meetings of the courts, like that of the bar, drew large attendances of lawyers and laymen, testifying their devotion to the memory of the deceased and their sorrow at the loss which the public and the bar had sustained. Memorial exercises were likewise held at Bowling Green, in Pike County, at the opening of the Circuit Court on Monday, November 28th 1898; touching resolutions were passed, and eloquent and inspiring eulogiums were delivered by Hon. J. C. Fagg a former judge of the Supreme Court of Missouri and one of the early law partners of Broadhead when he lived in Pike County, and by Henry T. Kent Esq. of the St. Louis Bar. A memorial of the Loyal Legion, of which he was a member, has been preserved, drawn by Henry Hitchcock, Wells H. Blodgett and D. P. Dyer; also a memorial of the Virginia Society of St. Louis, of which he was the first president. The records of the American Bar Association, of which he was the first president, contain an excellent memorial to his memory. The memorials and addresses referred to have been preserved in a memorial volume, distributed among the members of the St. Louis bar and the surviving family and kindred of Colonel Broadhead. This volume is already precious, and contains a most excellent photograph of Broadhead in his later life, a copy of which accompanies this sketch.

law and the authority of the courts, he also boldly stood for the rights of the bar, especially of those lawyers who bear the heat and burden of every-day work of our profession.

Speaking of them (and his words have a Baconian flavor) he said:

The school of the practicing lawyer enables him to acquire a practical acquaintance with human nature in all its multiple phases. He may learn what weaknesses may be pardoned; what excess of passion may be condoned. He may learn that there are in most instances two sides to every case. How apparent violations of right may be explained. How little difference there is in the great mass of human beings, and what are the secret springs of human actions which are hidden from the outside world, and he is, therefore, less disposed to form a rash judgment of human actions. It belongs to the members of the legal profession to study the rights of individuals in their various relations to each other and to the state, and to see that they are secured by a just administration of the law. To do this demands as well a thorough knowledge of the principles of jurisprudence as taught by the masters of the profession, the special enactments of legislators, and the origin of customs which have ripened into laws by the judgment of competent tribunals, not, however, by too much reading, but by much reflection and reasoning upon what the law should be in a given case, as also the relations of the different members of society to each other, the various industries which become subjects of contracts, the products of human genius which in the progress of a rapid civilization have developed new industries, and to what extent they have changed former conditions, and in all legal controversies in which they may be concerned to make a fair and honest presentation of the law and facts before the court, and above all things to avoid the stirring up of litigation, and when consulted by a client to counsel the settlement of a controversy without litigation if it is deemed advisable to do so, and, under all

circumstances, as an officer of the court, to have the courage to defend the right, however it may be assailed, whether by the voice of the multitude or the despotism of a single individual clothed with official power.

In the broadest sense, Broadhead was a large man. How often we who knew him best have involuntarily spoken of him as "the grand old man," thus applying to him a phrase that the world seems to have reserved exclusively for England's great commoner. He was of the type and mold mentally and physically of such men as Benton, Bates and Browning. It is not exaggeration to compare him favorably with men of higher renown and wider fame. Men may be great and good without playing their life's drama on the widest stage. In contemplating Broadhead when he was with us, and in estimating him since he has passed away, we were and are ever confronted with the thought of what he might have been without underestimating what he was. This is especially true in viewing him from the standpoint of a public official. Every station he held in public life, whether in our State Legislature or our Constitutional Conventions, in our Bar Associations, in military or civil place, in Congress or in the Diplomatic Service, he filled with honor, grace, dignity, ability and usefulness. Does anyone doubt he would have made a great minister of state whether as attorney-general or in any of the secretaryships? Would not his elevation to the bench, state or national, at any time before old age overtook him, have been welcomed with universal

approval? He was the stature of a chief-justice, American or English. As senator in Congress, he would have stood in the front rank as easily as he did stand in the front rank at the bar. If he had been sent as Minister to England instead of Switzerland he would have discharged the duties of that important post to the satisfaction of all. If the suffrages of his countrymen had called him to the presidency of the nation he would have been found fully equipped, and would have administered that high office with as much fidelity, ability and success as he did the early offices conferred upon him by his beloved constituency of old Pike, or the later ones which he held in obedience to the will of the people of the city of St. Louis and of the chief magistrate of the nation.

But why talk about what he might have been when we know what he was. He could have held no offices, however high, but his strong and striking individuality and his impressing personality would have overshadowed them all. I doubt whether our people could ever have habituated themselves to calling him by an official title, at least out of his presence and when unconstrained by conventionalities. It always seemed to me that they were hardly willing to add the southern and western prefixes Colonel or Judge. To them as to us he was always Broadhead.

As you saw him coming along the street he would convey to a stranger a type of a prosperous country gentleman who had drawn upon the best of the flocks of the fields and the fruits of the gar-

den for his table; nor was there lacking in his ruddy face the suggestion that the mint patch by the old spring was still flourishing.⁵

Those of us in Missouri who knew him well love to dwell upon him as a lawyer, for that was his life vocation, yet we cannot disguise the fact that Broadhead the man to some extent obscured Broadhead the lawyer. It was not in his nature to be a strict specialist. His active business life was passed largely as an advocate in the domain of the courts amid contending clients, or as a counselor in his office settling disputes and advising as to rights and liabilities. There were periods when he lived and acted within the domain of statesmanship. At all times he took a deep interest in all things which concerned humanity. Whatever he did was done so easily that he did not seem to labor. His weakness, if any, as a lawyer, was his indifference to details. This resulted largely from his ability to apply general principles and to solve questions upon necessarily undisputed facts. His power of generalization was marvelous. General Henderson once told me, speaking of the time when he and Broadhead were rival practitioners at the Pike county bar, that early in the contest he had to give up all hope of ever surprising or beating Broadhead upon questions of law, and that when he was so fortunate as to prevail in a lawsuit he could always trace back the result to his own careful preparation of the facts of the case

⁵ From addresses by Henry T. Kent before the memorial meeting of the Pike County Bar.

and the absence of that preparation on Broadhead's part.

I have been told that Samuel T. Glover, when once asked his estimate of Broadhead, replied in his sententious way: "A great lawyer; a great man. A very great lawyer; a very great man—when awake."

There was nothing about Broadhead that so much impressed others as what might be called his reserve power, which he possessed in a marked degree, as did Webster.

Broadhead always took an active interest in public and political questions. He belonged in his early life to the old Whig party, and his attachment to it was so strong that I very much doubt whether he would ever have bolted its platform or its nominees. He was not as federalistic in his views as Marshall or Hamilton. He was not so radically Democratic as Jefferson nor so fiercely Democratic as Jackson. His views were rather the composite of those of Madison and Webster. He was the antipodes of Calhoun. As a son of Virginia, he was not wanting in filial devotion, yet he believed so strongly in an indestructible union of indestructible states that had he lived there in 1861 he would not have believed with General Robert E. Lee that his first allegiance was to his state. He profoundly believed in the wisdom of the results which followed debate and contention in the courts, in constitutional conventions and in legislative bodies. He did not have the high-

est confidence in the conclusions of a primary, a caucus or a political convention. As a senator of Rome in its palmyest days he would largely have influenced and controlled the policy of the Republic, yet I doubt whether he could have molded to his will the fierce democracy of Athens. He had great respect for the verdict of the people at the polls. His theory evidently was to respect the conclusions arrived at after both sides had been heard. He was not quite an optimist, not a pessimist, nor was he an opportunist, he was the embodiment of conservatism. He rather grew restive under the restraint of party rule, and "independence was one of his fluttering plumes."

He could not bring himself to believe as strongly as some do that for a strong man with the capacity for political leadership unvarying allegiance to the party nearest representing his views is, in a republic like ours, the most practical way to promote the country's welfare.

It is not for me to speak of his domestic relations; as a son, brother, husband, father, he was nearly ideal, and to his kinsmen, to the remotest degree he was not unlike a massive live-oak, with capacious branches sheltering and protecting them from heat and storm.

His depth of sentiment was beautifully shown in an address which he delivered before the University of Virginia not long before his death wherein, among other things, he said:

And now, in conclusion, let me say, and you will pardon me for

saying it, that this occasion possesses peculiar interest to me, for here in the midst of these historic associations my untraveled heart fondly returns to my native home, where the blue mountains and green fields first met my infant vision. From my far off wonderings in the distant West I come, before the shadows of the evening have closed around me, to renew my devotions to the land that gave me birth.

Wherever Broadhead was there was sunshine, not clouds. What shall I say of his good comradeship? Or shall I trespass on those grounds? What of the attic hours? When surrounded by his familiars and his friends, how did he bear himself? Not like Dr. Johnson, the rugged old bear who made famous the London taverns by doing all the talking, and doing it so marvelously well. On such occasions Broadhead was not a raging conflagration, but rather the gentle and healthy glow of the hospitable fireside. He did not, like poor Yorick, "pour a pint of Rhenish on your head;" nor was his the wild, rollicking fun of Dickens or Eugene Field, but rather the genial humor and abounding pleasantries of Thackeray and Irving. Rich in literary attainments, full of poetry and sentiment, overflowing with classic and historic lore, there never was a more charming companion. It was a positive pleasure for him to receive the strokes of humor, and the shafts of wit and sarcasm and badinage from his friends rather than to strike the blow or draw the bow himself.

Broadhead had a deeply religious nature, and it was needed only to have heard him reverently speak the words (as he often did) "Divine justice," "Di-

vine Master," or "the Savior of the world," or "the providence of God," to find out this attribute of his character. He devoutly believed in "the fatherhood of God and the brotherhood of man."

His life was no failure but a crowning success. He lived nearly fourscore years. He was ever blessed with a "sound mind in a sound body." He held communion with the good, the strong, the wise, and with the brave, the tender, the true, and with the poor and unfortunate of his generation and by much reading with those of former times and distant countries. Compare him with his contemporaries, old or young, those gone before or left behind, and who was superior to him? In whom were all the elements so blended? And of those left, who towers above him?

Let me reiterate, in estimating him we must not fall into the error of comparing him with himself.

His simplicity was such that a child might lead him, yet his courage such that the strongest could not daunt him. When aroused he had much of the lion in him; none of the fox or the wolf. His life was mostly bright, and such sorrows as touched him, he met in philosophic spirit and with Christian fortitude and resignation. No one ever had a sunnier disposition. His goodly face was a benediction. Calmly and joyfully he pursued the even tenor of his way, yet, at all times, as Tennyson said of Wellington, "as the greatest only are, in his simplicity sublime."

He was not unlike the Mississippi on whose banks he dwelt, which moving steadily on, sometimes at a lower and sometimes a higher stage, anon bursting its bounds and fertilizing all it touches, then returning to its channel, continues its majestic march to the sea.

He gloried in nature, its mountains, lakes, plains, rivers, oceans and the overarching firmament. He found "tongues in trees, books in running brooks; sermons in stones and good in everything."

When the history of the times in which he lived shall come to be written by the impartial historian, it will be found that Broadhead left a permanent imprint, and his services to the American bench and bar will be recounted; and it will appear that he had very much to do in molding our laws, constitutional, legislative and judicial, and shaping the destiny of the great commonwealth of Missouri. As a lawyer, he not only maintained the ancient high standard of the profession, but dignified and ennobled it.

THOMAS READE ROOTES COBB.

THOMAS READE ROOTES COBB

From a photograph taken when General Cobb was about forty years of age. The picture shows the General in his Confederate uniform.



THOMAS READE ROOTES COBB.

1823-1863.

BY

SYLVANUS MORRIS,

Dean of the Law Department of the University of Georgia.

THE subject of this sketch, son of John Addison Cobb and his wife Sarah Robinson Rootes of Fredericksburg, Va., was born in Jefferson County, Georgia, on April 10th, 1823. He spent the greater part of his life at Athens, Ga. Graduated from the University and admitted to the bar, he rose rapidly to the top of the profession.

In the year 1844 he married Marion McHenry Lumpkin, daughter of Joseph Henry Lumpkin, the first chief-justice of Georgia. He held the position of reporter of the Supreme Court for several years. He compiled the Statutes of Georgia and published the work under the name of Cobb's Digest. He was the author of Cobb on Slavery, the second volume of which work has never been published. He was one of the founders of the Lumpkin Law School, which subsequently was incorporated into the University as its Law Department, and he was one of its professors.

He founded the Lucy Cobb Institute at Athens for cause of common school education. He proposed a

system of taxation for that purpose and earnestly advocated it with tongue and pen.

He founded the Lucy Cobb Institute at Athens for the higher education of women, which is to-day one of the largest and most prosperous schools in the State.

Mr. Cobb was an officer in the Presbyterian church and for many years an earnest worker and teacher in the Sunday-school, and took a prominent position in the councils of that denomination.

While thus actively employed in these diverse and time-requiring matters, he was engaged in full and lucrative practice of his profession. Few men have possessed in like degree with him the rare gift of clear, concise statement. His contemporaries justly attribute his success as an advocate to this quality of his mind.

He had never sought public office. His taste did not seem to lead in that direction, and the engrossing nature of his other occupations forbade it. But when the question of secession arose, he took the field, and with the earnest zeal of a strong soul, like a second Peter the Hermit, he preached a crusade against what he believed to be an attack upon home, right and liberty.

Mr. Cobb was a member of the Secession Convention of Georgia, and of the convention which framed the Constitution for the Confederate States, and the original draft of that instrument is in his handwriting.

He declined, however, to accept office under the

Confederate Government. Having taken so prominent a part in bringing about the secession of his native State, it was but characteristic of the man that he should go to the front, personally to fight the battle for the principles he advocated. In a letter to Mrs. Cobb, written from Montgomery under date of May 10th, 1861, he says in reference to this matter, "I told Mr. Toombs I would not have any office the Government could give me. I was not peculiarly fitted for military affairs, but I was ready gratuitously to give my services."

At the beginning of hostilities he organized Cobb's legion, composed of the three arms, infantry, cavalry and artillery. To the mastery of the science of war and an acquisition of a knowledge of his military duties he brought the same careful, painstaking, conscientious, untiring application to even the minutest detail, which characterized his entire life.

At Fredericksburg, in December, 1863, he fell mortally wounded while commanding his brigade, near the historic stone wall at the foot of Marye's Hill. Thus in his fortieth year he ended a busy and useful life in sight of the spot where his mother had grown to womanhood and married. Before he had reached middle age he had accomplished more than men of like ability find time to do in the course of a long life.

Tom Cobb was many-minded. Rarely has any man done so many and such diverse things and done them all well. Therefore it is difficult to decide

what was his most characteristic quality. His co-religionists speak of his earnest zeal for religion, of his all-permeating faith in the truths of Christianity. Lawyers give greatest prominence to his power in the management of causes in court. Others quote the words of General Robert Lee in his letter to Honorable Howell Cobb, giving high praise to his military success. From all this it would seem that he possessed above the average man, untiring and painstaking energy, accompanied with great mental activity.

In the preparation of his book on Slavery, no source of information was too obscure or insignificant to escape his investigation. He renewed his knowledge of the French language, and actually acquired a reading knowledge of the German, in order to pursue his investigations upon this subject. This is but an example of his method of dealing with every matter which he took in hand. Thoroughness, then, seems to have been his most distinguishing characteristic.

This is not the time or place to speak of the beauty of his home life which breathes through his letters to the members of that home-circle written during his absence on business or pleasure, and from the field of hostilities in Virginia.

Like all men of real worth, those who knew him best loved him most. Those nearest to him held him in the highest esteem.

The work of Mr. Cobb which left the deepest im-

press upon his native state is the part taken by him in the codification of the laws of Georgia.

Under an act of the Legislature, November, 1858, three commissioners were appointed by the Governor, to-wit: Honorable Richard H. Clark, Honorable David Irwin, and Mr. T. R. R. Cobb, to codify the laws of the state. The work was completed and the Code adopted by the Legislature in the year 1860, but the work is known as the Code of 1863. It consists of four parts:

1st, The Political and Public Organization of the State

2d, The Civil Code

3d, The Code of Practice, and

4th, The Penal Code.

To Judge Clark was assigned Part 1, to Judge Irwin Part 3, and to Mr. Cobb, Parts 2 and 4. The commissioners had before them the digests of the laws of the state, as well as the digests of the laws of other states, and countries.

These consist of the statutes just as enacted, with all their errors of expression, superfluity, repetitions, and contradictions, arranged under their respective heads with more or less system. The codifiers also had the three Codes of Theodosius, A. D. 438, the Justinian Code, A. D. 533, and the Code of Napoleon, A. D. 1807.

The Theodosian Code is more nearly a digest than a code. The commissioners who framed the code of Justinian had no authority to make new laws. For this reason it has been said "it was not codification but

consolidation, not remolding but abridging." Codification we understand to be the reduction of the existing body of laws to a new form, the restating it in a series of propositions, scientifically ordered, which may or may not contain some new substance, but at any rate, new in form. Justinian's Code made extracts from the existing laws, preserving old words and only cutting out repetitions, removing contradictions, retrenching superfluities so as to reduce immensely the bulk of the whole. The matter was old in expression as well as in substance.

The Code Napoleon went yet a step farther, and not only condensed and consolidated, but also harmonized the systems of laws existing in France, Holland, Rhine Confederacy, Westphalia, Bavaria, Italy, Naples, Spain and Louisiana.

The third step towards complete codification was taken by the Georgia codifiers. Codification, then, is of three kinds:—

1. The classification of statutes of force, systematically arranged according to subject matter, without amendment, alteration or interpolation of new law, the only change being in the correction of errors of expression, repetition, superfluities and contradictions, compressed into as small a space as possible, which when done will leave the laws in letter and spirit just as they were.

2. The same as the first in form, but going farther and making such amendments as are deemed necessary to harmonize and perfect the existing system.

3. To take a yet greater latitude, and without changing the existing system of laws, to add new laws, and to repeal old laws (both being done in harmony with that system) so that the code will meet present exigencies and so far as possible, provide for the future. This last is real codification.

The Code of Georgia answers the description of the third kind, and is the only code in the United States which fulfils the definition. It changed or repealed existing laws and it made new laws. Beyond this it has a feature which no other code, and for that matter, which no other book has. It codifies the common and statute laws of England of force in Georgia, and the established principles of equity, so as to give them the form and force of new statutes.

Georgia has no unwritten law. This last feature is the chief glory of the Code. This work was done by Mr. Cobb.

As illustrative of the work of the codifiers in the repeal of law, the language of the Code is: "The vendor's equitable lien for the purchase money of lands is abolished in this state."

To illustrate the addition of a law, the crime of seduction is defined, and the penalty prescribed, for the first time in the Code.

The harmonizing and clarifying of the laws is exemplified in provisions such as follows: "A mortgage in this state is security only for a debt, and passes no title." "There being no rational distinc-

tion between excusable and justifiable homicide, it shall no longer exist." It has been long and by many eminent authorities doubted whether the codification of the laws of a state were possible, and if possible, whether it is expedient. Without reopening the discussion, it need only be said now that the Code of Georgia has successfully stood the test of actual application in and out of the courts for nearly half a century. It continues to grow in favor with the lawyers and the people.

A distinguished lawyer in this state said of the original Code in an article on "The Evolution of the Code:—"

"We know well that it is one of the very best law books ever made in the United States." In reference to the subsequent history he says:

Thus the evolution of the code is complete. Beginning with scattered pamphlets, it passed into a compilation, from a compilation into a digest, and from a digest into a code. The present code is but a full blown flower of which the first compilation was a bud.

What of the contents of this book? Many of the statutes were passed a century ago, some of them nearly a century and a half ago. All along, year by year, laws were added or changed or withdrawn, as time and experience discovered the wisdom of making changes, until we have a complete body of laws, symmetrical as a whole and perfectly adapted to our present conditions as a people.

Seeing, then, that Mr. Cobb did a thing which is

unique in the whole world of law, one naturally asks why the Code did not at once "create a sensation in the legal and literary world?" The reply is found in the fact that the Code was born during the fierce struggle of the War between the states, which was followed by the troublous period of reconstruction.

Outside the State, there has been practically no recognition of the peculiar excellence of the Georgia Code. Nothing on the subject has met the eyes of the writer of this sketch save only a few lines from the pen of Honorable Simeon E. Baldwin, in the introduction to "Two Centuries' Growth of American Law" by the members of the faculty of Yale Law School.

Speaking of the David Dudley Field Code of Procedure, he says:

Georgia at this point passed New York. She had set several of her ablest men, headed by — Cobb, at a similar work and was the first American state to adopt a Civil code. This was in 1860 and her example has been followed by several of the others, most of them in the Far West.

It is a matter of interest to be noted in passing that a recently-published law dictionary takes many of its definitions from the Code, giving due credit.

The penal laws had already been codified in the years 1816, 1817 and 1833, and were then in fairly complete shape, covering both common and statute laws upon the subject of crimes.

From the adoption of the first Constitution in 1798, until 1861, Georgia made no change in her organic

law. In the latter year a new constitution was adopted. Mr. Cobb was the chairman of the committee on the revision of the constitution. The original draft of the constitution, which was subsequently adopted almost without change, was penned by Mr. Cobb before the meeting of the convention at Savannah. This was superseded by the Constitution of 1868.

For seven years the people of Georgia lived under Mr. Cobb's Constitution and for more than thirty years they have lived under a code of laws which in its most difficult and important part was executed by him. It is certainly not claiming too much to say that no man has left upon the laws of this state so deep an impress as Thomas Reade Rootes Cobb.

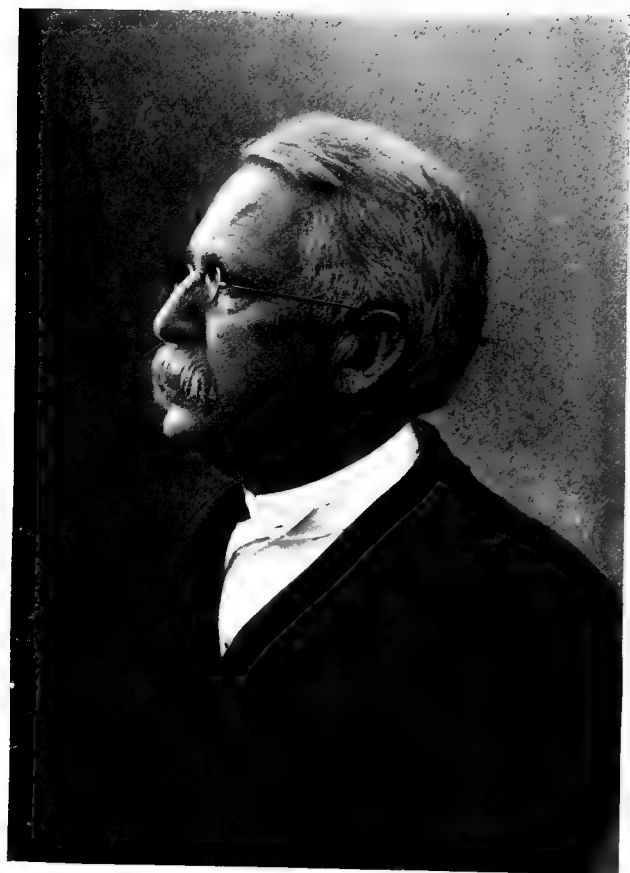
If the Roman poet might, with justice, claim for himself that he had reared a monument more enduring than bronze, by fitting the stately language of Latium to the graceful measure of Hellas, surely a like claim may be made for him who enjoys the unique distinction of having given scientific symmetry to the established principles of common law and equity.¹

¹ Courteous permission to make use of parts of two papers: "The Origin of the Code," by Hon. Richard H. Clark, and "The Evolution of the Code," by Hon. John L. Hopkins was given by the latter, and by the literary executrix of the former gentleman.

JOHN RANDOLPH TUCKER.

JOHN RANDOLPH TUCKER

From a photograph taken when Professor Tucker was about fifty-five years of age.



JOHN RANDOLPH TUCKER.

1823-1897.

BY

WILLIAM REYNOLDS VANCE,

Dean of the Law Department of the George Washington University.

JOHN RANDOLPH TUCKER, the most brilliant and eminent of a long line of statesmen and lawyers, was born at Winchester, Virginia, December 24th, 1823. Descended from aristocratic ancestry distinguished both in law and in letters, he affords in his character, attainments and career, a rare illustration of the influence of a noble heredity.

Early in the eighteenth century Henry Tucker, of excellent English family, removed to the Island of Bermuda, and there, in 1752, was born his second son, St. George Tucker. While the elder brother, who was named after his father, returned to England, to render eminent service to his country as chairman of the East India Company during the Peel ministry, St. George Tucker turned his face westward, and in 1770 went to the rising colony of Virginia, where he entered William and Mary College. After completing his academic studies, he took a course of law in the same college, and at once came to the bar in Williamsburg. With the coming of the conflict be-

tween the colonies and the mother country young Tucker enthusiastically espoused the revolutionary cause, and became a devoted and powerful exponent of the principles of liberty and republican government. During the war he performed some daring military exploits, particularly in the conduct of a successful expedition against his native island, Bermuda. He also distinguished himself as commander of a cavalry regiment under General Greene at the battle of Guilford Court House, and later was present at the siege of Yorktown. Upon the restoration of peace, he resumed his practice at Williamsburg, and before reaching the age of forty was the recipient of many public honors at the hands of his countrymen, being successively appointed judge of the General Court of Virginia, a member of the Court of Appeals of Virginia, and later, in 1813, by President Madison, judge of the District Court of the United States.

In 1787 he was appointed professor of law at William and Mary College, succeeding in that position the eminent chancellor, George Wythe. During the sixteen years of his incumbency of this honorable position he was intimately associated in cordial friendship with John Marshall, by whom he was much beloved until the day of his death, in 1827. In connection with his duties as professor of law, he prepared and published the celebrated commentaries known as *Tucker's Blackstone*, and in connection with them a treatise on the Federal Constitution,

which is remarkable not only as the first systematic treatise upon that great document, but also for the discriminating foresight which characterizes the views of this early Virginia lawyer.

His first wife was Mrs. Frances Bland Randolph, mother of the eccentric statesman, John Randolph of Roanoke. The first son of this marriage, born in 1780, was Henry St. George Tucker. Like his father he was educated at William and Mary College, and like him was lawyer, statesman, judge and teacher, and, on occasion, soldier, having served in the War of 1812. He began the practice of law in Winchester in 1802 and five years later was married to Miss Anne Evelina Hunter, whose father, Moses Hunter, himself a lawyer of distinction, came of a long line of eminent jurists. From the first his success at the bar was great and his ability was so generally recognized that immediately after the restoration of peace, in 1815, before he was thirty-five years of age, he was elected to Congress. During his service in the House of Representatives an incident occurred which strikingly illustrates the fine-grained sense of honor of this typical Virginia gentleman. He opposed a bill increasing the salaries of members of Congress on the ground that it was retroactive and would enure to his own benefit, saying that "he could not vote for a bill which gave additional compensation to himself." After the passage of the bill he refused to receive the additional compensation which it gave, and to this day, on the books of the United

States Treasury, there is a balance to his credit which neither he nor his representatives have ever claimed. Henry St. George Tucker seems to have had little fondness for political life, and at the close of his second term in Congress declined a reelection. Shortly afterwards, however, he accepted an election to the State Senate of Virginia, probably in order to facilitate his practice of law before the Court of Appeals, in which we find him extensively engaged during the following years. In 1824 he was elected judge of the Superior Courts of Chancery for the Winchester and Clarksburg Districts, and while holding this position he organized a law school at Winchester, which he conducted during the whole period of his chancellorship. Judge Tucker evidently possessed great ability as a teacher, as is evidenced by the fact that this law school, in the small and inaccessible town of Winchester, attracted large numbers of students from all parts of Virginia and the south, at a time when law schools were not generally recognized as proper agencies for legal education. In connection with his work as a teacher of law, he published his "Commentaries," a treatise on Virginia law, which was in the nature of an extension of the work of his father in Tucker's Blackstone. In 1831, Judge Tucker was appointed president of the Virginia Court of Appeals, upon which he served with great distinction until 1841, when he resigned in order to accept a professorship of law in the University of Virginia. While at the University he established the "honor

system" of student control which has so long been a striking feature of that institution.

After four years, however, his health was so greatly impaired that he resigned his chair in the University and retired to Winchester, where he died in 1848, universally lamented by the people of Virginia. The singularly beautiful epitaph on his tomb at Winchester, gives eloquent testimony of his qualities of greatness, and may be quoted without apology:

IN MEMORY OF
HENRY ST. GEORGE TUCKER
Late President of the Court of Appeals.

Learned without pedantry; grave without austerity; cheerful without frivolity; gentle without weakness; meek but unbending; rigid in morals, yet indulgent to all faults but his own.

The elements of goodness were in him combined and harmonized in a certain majestic plainness of sense and honor, which offended no man's self-love, and commanded the respect, confidence and affection of all.

A faithful husband; a kind and prudent father; a gentle master; a steadfast friend; an able and diligent public officer.

He lived without reproach
And died without an enemy.

The third son of Henry St. George Tucker, John Randolph Tucker, named for his distinguished half-uncle, John Randolph of Roanoke, was as stated above, born on December 24th, 1823, in Winchester, Virginia, where he received his early education. In 1831, following the election of his father to the presidency of the Court of Appeals, he went with the fam-

ily to Richmond, and at the age of thirteen entered the Richmond Academy. After two years of preparation in that institution he went, at the early age of fifteen, to the University of Virginia, and in the following year was graduated in Mathematics, a remarkable achievement even in that day. In 1844 he received the degree in law from the same university, having studied under his father, then professor of law. Immediately thereafter, at the age of twenty-one, he opened an office for the practice of his chosen and hereditary profession in Richmond, Virginia, but making little progress there, he removed after one year to the town of his birth, where he formed a fortunate partnership with the eminent lawyer, Robert Y. Conrad. Despite his extreme youth he soon won for himself an enviable position at the Winchester bar, and even thus early gave evidence of that scholarship in the law, that capacity for profound thought and the wonderful gift of expression that characterized him throughout the brilliant career that was now fairly begun.

In 1848 he was united in marriage with Miss Laura Powell, daughter of Colonel Humphrey Brooke Powell, of Loudon county, a lady whose qualities of heart and mind well fitted her to be a worthy helpmate of her husband throughout his long and active life.

While his professional activities were great and his consequent engagements engrossing, he soon showed that keen interest in the public questions of

his day that has always been so marked a characteristic of the Virginia Tuckers. In 1851, when but twenty-seven years of age, he delivered a remarkable address before the Alumni Association of the University of Virginia, which brought him to the attention of the whole state. His theme was the relation between the federal government and the sovereign states, which gave him occasion to present what is probably the most powerful legal and historical argument in favor of the right of secession that now exists in our literature. The late W. S. Holman, member of Congress from Indiana, esteemed this address so highly that he had it bound with the speeches of Lincoln and Douglas as affording, with them, the best exposition of the two divergent views of the Federal Constitution. At this time, however, while contending for the right, Mr. Tucker did not advocate the policy of secession. This will become apparent from a brief extract from this early speech, which is also worth quoting as setting forth the keynote of his political faith, of those views, which, in the fine words of his son, Henry St. George Tucker, were "not merely his intellectual opinions, but his deep convictions, in the consistent exercise of which he lived and in the faith of which he died; and neither the dissent of friendship, nor the storm of popular indignation, nor yet the hope of political preferment, ever shook his unswerving devotion to them:"

I solemnly believe, that the manly assertion of the right I have maintained, would save the Union; and what is more valuable,

though in these days of sublimated patriotism not so regarded, our rights under the Constitution. It would bring peace where there is hostility; love where there is hate; it would plant sympathy in the place of antipathy; and again, we should have a union of states, each able to protect itself, and secure, peaceful and happy. . . .

He alone is the true friend of the Union, who cherishes and upholds the sovereignty of the states, as the pillars upon which the edifice must rest, or topple to its ruin; as the tribunician power of our system, with all its sacred inviolability; as the political units at whose voice it sprang into being, and at whose will it must cease to be; as the separate chords of that wondrous harp, which vibrate not in the sullen monotone of a centralized despotism, but, swept by the winds, sound the bold and joyful anthem of a free, happy and prosperous confederacy!

Running through all the addresses which the young lawyer was at this time frequently called upon to make in various parts of the state, we observe this note of deep devotion to his native commonwealth, Virginia, an intense belief in the necessity of maintaining the integrity of the states in the possession of all the sovereign powers with which they were clothed at the time of their entrance into the Federal Union, and the steadfast conviction that the preservation of the liberties of the people and the integrity of the states required a jealous limitation of the powers of the federal government.

The other burning question of the day was the institution of slavery, upon which we are not surprised to find that Mr. Tucker entertained and forcefully expressed very decided views. In a notable address delivered at William and Mary College in

1854, when he was just thirty years of age, he thus spoke of the great problem that weighed so heavily on the consciences of thoughtful Virginians, and which, by reason of the intemperate agitation that it aroused in the northern states, was an irritating topic to all southerners:¹

If I am asked, Was it originally right to bring the Africans here? my answer is brief, but to my mind conclusive. It is not a question for your conscience or mine. We did not bring them here. If it was wrong, the responsibility of the act was assumed by a generation which once lived, and, having passed away, has met it long ago, at a higher than human tribunal. The act of bringing has left no load of responsibility upon the souls of this generation. "The fathers have eaten sour grapes, and the children's teeth have *not* been set on edge."

For I put it to any candid man, who hears me, or who will examine this question as he should, whether the very best relation for the two races, if they must live together, be not that of master and slave? With our own experience of the relation between the white and the free negro population—and more than that, with the experience of the free states expressed in many of their new constitutions—can any man hesitate to say, that, as the two races exist in the South, the most favorable condition for the African is slavery, and the only condition for the Saxon, consistent with his progress or even existence, is that of being the director of the physical and moral energies of a race whose incapacity for self-control, centuries in the past and the experience of the present amply demonstrate?

It is not my purpose to vindicate further this important relation in the Southern States. This digression from the general purpose of my address was merely intended as a defense of the institution

¹ In 1796 Mr. Tucker's grandfather Judge St. George Tucker, had published a pamphlet discussing the negro problem, and advocating gradual emancipation.

of Slavery from the charge of being anti-Republican; and to show that, upon the principle already established, and with the two races co-existent in our Southern society, Republicanism demands the maintenance of that institution, as best adapted to the happiness and well-being of the subject race; and as alone consistent with the progress and civilization of that to which Providence has awarded the supremacy.

However much we may differ in modern times from the conclusion that the continued existence of slavery afforded the best solution of the race question, the profound truth of Mr. Tucker's statement of the problem must appeal to all students of the same problem that is still so darkly with us. It is also worthy of remark that the analysis of the question as made by the young Virginian in 1854 is not far different from that given out in 1906 by that distinguished representative of a great New England family, Charles Francis Adams.²

The beginning of Mr. Tucker's political service was almost contemporaneous with the beginning of his professional career. In the presidential elections of 1852 and 1856 he was an elector on the state Democratic ticket. The first campaign, however, in which he won a reputation throughout the state, was that of 1855, when in advocating the election of Henry A. Wise as governor, he was generally recognized as the

² "One thing seems clear, without being reduced to servitude, the inferior race must be recognized as such, and, in some way, so dealt with. Facts are facts; and only confusion results when things essentially not equal are dealt with on the basis of natural equality."

See, "Reflex Light from Africa," by Charles Francis Adams, in the *Century*, May, 1906.

chief factor in bringing about the defeat of the Know-Nothing party, then at the height of its noxious vigor. The great services rendered by him in this campaign fixed the confidence of his party in his sincerity and ability and won for him a reputation as an orator of rare eloquence and power, while his strikingly handsome person and lovable personality, together with his remarkable gift as a raconteur, gained for him the devoted friendship of all who came in contact with him. In 1857 he first entered public service, having in that year been appointed by Governor Wise, Attorney-General of Virginia, to fill out the unexpired term of Willis P. Bocock. His performance of the duties of this office was so acceptable to the people that he was twice elected his own successor, for the terms beginning in 1859 and 1863. His services to the state in this capacity thus extended through the exciting years preceding the outbreak of hostilities, and the stormy period of the Civil War, coming to an end only when the state government of which he was a part fell before the bayonets of Grant's soldiery.

During Mr. Tucker's term as attorney-general he argued many cases of great importance before the Court of Appeals, besides rendering to the various officers of the state government opinions on many of the momentous questions that confronted those in authority during these troubled times. Despite the great excitement that prevailed in every walk of life he performed his official duties with his characteristic

energy and industry, and with marked success. In all considerable cases which he argued before the Court of Appeals, especially those involving matters of constitutional law, he filed elaborate and able briefs, which remain to this day as set forth in the fourteenth, fifteenth and sixteenth volumes of Grattan's Virginia Reports, monuments to his legal scholarship and acumen. The most important constitutional question which he was called upon to argue as attorney-general was that raised in the case of *Baker vs. Wise*,³ in which he succeeded in establishing that a Virginia statute authorizing the search by state authorities of all vessels departing from Virginia waters was a police regulation not obnoxious to the commerce clause of the Federal Constitution.

Probably his most trying service on behalf of Virginia during this period was rendered when he went as the representative of the state to Pennsylvania to defend a young Virginian, who had followed thither a runaway slave and had been indicted for kidnapping on account of his recapture of the slave. His success in defending the prisoner under such circumstances, in view of the hostility of the people in the place where the trial was held, and the intense feeling in the northern border states against the pursuit of fugitive slaves, was a tribute not less to his tact and attractive personality than to his skill as an advocate.

Immediately after the war Mr. Tucker removed

³ 16 Grattan's Reports, 139.

from Richmond to Middleburg, in Loudon county, where he formed a partnership with Burr P. Noland, with whom, for several years, he carried on an extensive practice throughout the upper counties of Virginia and before the Court of Appeals. It was during this period that he was retained with Charles O'Connor and other eminent lawyers as of counsel for Jefferson Davis, Ex-President of the Confederate States, then under indictment for treason. Mr. Tucker's success in the conduct of several cases in which he was special counsel for the Baltimore & Ohio Railroad Company attracted the attention of John W. Garrett, then president of that corporation, who, in 1869, induced Mr. Tucker to accept an appointment as counsel for the railroad company and to remove to Baltimore. We could scarcely expect, however, a Virginia Tucker, to be happy elsewhere than in his native state, and although there were many incidents in his life in Baltimore that afforded flattering evidence of the esteem in which he was held by the people of that city, his spirit yearned for the old associations in Virginia, and for the mountains and streams of his native land. An opportunity to return from this friendly exile came in the form of a letter from General Robert E. Lee, then president of Washington College—now Washington and Lee University—in the beautiful little mountain town of Lexington, Virginia, to assume the chair of Constitutional Law and Equity in that institution. While the salary that could be paid from the depleted treasury

of the Virginia college was much less than the income received by Mr. Tucker from the active practice of his profession, yet his great sympathy for and interest in young men, his hereditary love of teaching, and his scholarly temperament, together with the inspiring opportunity of aiding the great leader of the Confederate armies in his noble purpose of training the young men of the south for courageous and useful citizenship, promptly determined his acceptance of the proffered professorship. He arrived in Lexington in the autumn of 1870, to find General Lee upon his death-bed.

Mr. Tucker entered upon his duties as teacher with characteristic enthusiasm and success, but for a man of such brilliant public gifts seclusion was impossible. In 1874, without his solicitation or previous knowledge, he was nominated for Congress from the old Sixth Virginia District, on the Democratic ticket, and was elected by an overwhelming majority. On March 4th, 1875, he entered the House of Representatives, in which body he served continuously for twelve years.

It may be truly said that the history of this period of Mr. Tucker's life would be a history of the lower house of Congress, so intimately was he connected with the work of that body during his entire term of service. It is also probably true that, despite the disappointments and petty intrigues that seem to be inseparable accompaniments of political life, and which were undoubtedly keenly felt by one of so high-strung

and sensitive a temperament, yet, withal, this was undoubtedly the happiest period of Mr. Tucker's life. For during this time he was thrown into intimate personal contact with practically all the eminent public men of the day, and enjoyed the warm friendship as well as the admiration of those that were worthiest.

In his first speech made in Congress, in January, 1876, Mr. Tucker laid down in no uncertain terms the tenets of his political faith. He opposed the proposed appropriation for federal participation in the Centennial exhibition on the ground that the states had not given the federal government power to make such expenditures of the federal funds. He insisted that the functions of the federal government must be strictly confined to the exercise of those powers that are already delegated to it by the Constitution or that are necessarily incident to such delegated powers. In this belief he remained unshaken throughout his career in Congress, and indeed, until the day of his death. It served as a basis for the powerful arguments, which he never lost an opportunity to make, against the constitutionality of protective tariffs. He insisted that the governmental power to tax was limited by the Constitution to the raising of revenue, and that it had, under the Constitution absolutely no power to take from one citizen in order to give to another, even though that other should be engaged in the conduct of an "infant industry." In this connection he was wont to quote the

words of Mr. Justice Miller taken from the opinion of the court in *Loan Association vs. Topeka*:⁴

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private tunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

His speech made on May 8th, 1878, on the pending tariff bill, was generally considered by both sides of the House the most powerful presentation ever heard in the House of Representatives of the views of those who opposed protective tariffs. The peroration of this speech, undoubtedly the greatest ever delivered by Mr. Tucker, is pitched upon a plane of such noble patriotism and is such a fine example of the best order of eloquence that it may well be quoted:

Brothers in a common humanity, we are co-heirs of liberty under constitutional law, and co-partners under Providence of a virgin continent! Oh, my brothers of America, God help us, have we not something nobler to do than to rake up the ashes of our former strife, and stir again its fires? Something higher and better than to revive the enmities, the jealousies of the past, and to fill these halls with criminations and outbursts of passion? Yes, let the dead past bury its dead; let us cease bickering and disputing as to the right and wrong of the great struggle; let us strive to forgive and forget the angry feuds which filled the land with blood and mourning and desolation, and, turning from these passions which disturb the balances of judgment, paralyze duty for the busy present, impair faith and hope in our forbearance for each other's faults, let us clasp hands and join arms in the pledge

⁴ 20 Wallace's Reports, 655.

of earnest co-operation under the dictates of divine duty, in pressing forward the destiny of this mighty people in a career of honor, prosperity, and civilization, which will make our Constitutional Union of states the glory of the world, and a blessing to our children's children to the remotest generation.

During Mr. Tucker's second year in Congress occurred the exciting contest between Mr. Hayes and Mr. Tilden for the presidency. Mr. Tucker was among those selected to advocate before the Electoral Commission the claims of the Democratic candidate. It was during the argument of the Louisiana case by Mr. Evarts, of the Republican counsel, that the drowsiness of the venerable historian, George Bancroft, gave the occasion for an oft-repeated *bon mot*. Mr. Tucker, pointing to the sleeping historian, said in a stage whisper to those sitting next to him, "History sleeps while fiction speaks." Mr. Tucker made other notable speeches in Congress, on the Hawaiian treaty, on the bill for the suppression of polygamy among the Mormons in Utah, which after being passed was known as the Tucker-Edmunds Bill, on the presence of federal soldiery at the polls, and on divers other topics of less permanent interest.

Early in his congressional career Mr. Tucker was assigned to the two great committees on Ways and Means and on the Judiciary, being chairman of the former during one session, and of the Committee on Judiciary during the last two terms of his service. It was in connection with his duties as chairman of the Judiciary Committee that his great learning and sound judgment in matters of constitutional law were,

perhaps, of most service to his country. The reports which he made to the House on behalf of this committee give evidence of indefatigable research and the exercise of rare judgment upon a great number of varied and important questions referred to the committee by the House. It was by means of these careful and learned reports, as well as through his arguments before the House, that Mr. Tucker gradually acquired the reputation of being the first authority in that body on constitutional law, a reputation that has since broadened until it is now recognized that he was one of the ablest and most learned of American constitutional lawyers.

The depth of the impression made by Mr. Tucker during the twelve years of his service in Congress upon those who served with him in the House, as well as upon the public at large, is best attested by the permanence of his influence. Many Republicans as well as Democrats came to see the wisdom of his theory concerning the construction of the Constitution, and his speeches and reports, and his work on the Federal Constitution, are still frequently quoted on the floor of both houses of Congress. In the recent report of the Judiciary Committee, denying to the federal government the power to control corporations engaged in insurance or other business not involving interstate commerce, one of the principal authorities relied upon was Mr. Tucker's book on the Constitution. The chairman of the Committee, who prepared this report, though a Republican of the

straittest sect, is a frank admirer and disciple of Mr. Tucker.

Striking testimony to the sincerity of Mr. Tucker's political convictions and to his chivalrous courtesy in the midst of heated debate is to be found in the fact that he was respected by all and loved by many of his political opponents in Congress. Indeed one of his most intimate friends in Congress was James A. Garfield. This friendship, based upon mutual respect for the character, and admiration for the talents of each, was an honor alike to both men. They conferred on all important matters before the House, read to each other, for purposes of advice and criticism, speeches prepared for delivery in the House, and even made and lived up to an agreement that each should bring to the attention of the other any striking passages or fine conceptions that he might note in the course of his general reading. Finally, a touching proof of the confidence of the great Republican statesman in his Virginia friend was given when, after the tragic and untimely death of Mr. Garfield, it was found that he had appointed Mr. Tucker guardian of his children.⁵

In 1886, six months before the meeting of the nominating convention, Mr. Tucker, wearied of petty

⁵ Opposite these sentences in one of Mr. Tucker's speeches: "In this sense there was nothing new in the Declaration of Independence. The rough jewels of a people's thought were gathered, polished, and set in this splendid coronet, placed upon the brow of a virgin continent, by the genius of Jefferson," we find a note in his own handwriting declaring with a touch of boyish enthusiasm, that Garfield had "expressed admiration of it as a specimen of the art of speech."

strife and ignorant and unfair criticism, published a letter declining to accept another nomination. After the expiration of his sixth term, on March 4th, 1887, he retired from Congress, and at once entered upon the active practice of law in Washington, his retainers being chiefly in cases before the Supreme Court of the United States involving constitutional questions. The most important of these cases were the Virginia Coupon Cases.⁶ They attracted great interest not only because of the intrinsically interesting points of law involved, but also because Virginia's right of self-preservation was at stake. The immediate question to be decided was whether a suit to enjoin officers of the state from bringing suit, on its behalf and by its orders, to enforce payment of taxes for which a valid tender of coupons had been made, was a suit against the state and thus within the prohibition of the Eleventh Amendment of the Federal Constitution. The cause of Virginia was considered hopeless by many learned authorities consulted, among whom was Mr. Tucker's brilliant associate, Roscoe Conkling. Mr. Tucker, however, never despaired of success in the case, and the judgment of the court, the opinion being rendered by Mr. Justice Matthews, adopting his theory of the case and fully sustaining his contention that the suit was really against the state of Virginia, marked what was probably the greatest professional triumph of his life. It must not be inferred, however, from Mr. Tucker's

⁶ 123 United States Reports, 443.

advocacy of Virginia's cause in this celebrated controversy that he had any sympathy for the movement, then strong in Virginia, for the repudiation—or as the euphemists of the state put it, the readjustment—of the state debt. During the long struggle extending from 1867 to 1889 Mr. Tucker contended heroically for state honesty in the payment of the public debt, and it was largely due to his unflinching courage in this contest that Virginia escaped that dishonor that fell upon some of the southern states as a distressing aftermath of reconstruction.

In 1889, Mr. Tucker was called to resume the full duties of his chair of Constitutional Law and Equity in Washington and Lee University. During the whole of his congressional career he had retained his residence in Lexington, and also his connection with the University, returning thither to lecture on Constitutional Law at such times as his public duties in Washington would permit. The request that he should give his whole time to the Law School of the University therefore appealed to him with the greater strength, and with that remarkable disregard for the purely commercial phase of his profession that characterized his whole career, and led by the always dominating desire to devote his powers to the welfare of others rather than to the advancement of his own interests, he retired from the courts to the secluded walks of academic life. But even in the mountain fastness of Lexington he could not wholly escape the demands of the world outside. He was occasionally

induced by considerations of friendship or loyalty to his state to undertake the conduct of cases at *nisi prius* or on appeal before the Virginia Court of Appeals or the Supreme Court of the United States. His last appearance before the Federal Supreme Court, the members of which esteemed highly his learning and judgment,⁷ and always heard him gladly, was in the argument of the South Carolina tax case, reported as *In re Tyler*,⁸ in 1893. Although in his seventieth year, Mr. Tucker argued the case with undiminished vigor and clearness.

Mr. Tucker's conspicuous service in Congress had caused his fame as an orator and scholarly statesman to spread throughout the United States, so that during these last ripe years of his life he was in constant demand as a speaker on public occasions of all kinds in all parts of the Union. His generous nature prompted him to respond to these demands whenever

⁷ The venerable Justice John M. Harlan, of the United States Supreme Court, recently wrote of Mr. Tucker as follows:

"I recall with some distinctness the arguments of John Randolph Tucker in the Supreme Court of the United States—particularly those in *ex parte Spies* (123 United States Reports, 131), *ex parte Ayres* (123 United States Reports, 443), and *McGahey vs. Virginia* (135 United States Reports, 662, 685.) His arguments in those cases showed that he was not only an accomplished advocate but was widely and accurately versed in legal principles. Beyond all question, he was thoroughly trained for the work of his profession. His statement of the issues in the particular case under argument was so lucid and orderly, and his presentation of the principles upon which he relied, was so attractive and powerful, that he never wearied the Court. On the contrary, the Judges always followed him with interest. In my opinion, he was one of the foremost of the American lawyers of his generation."

⁸ 149 United States Reports, 164.

circumstances would permit, and we accordingly find him delivering masterly addresses, full of wisdom drawn from literature, history and his own wide and varied experience, before institutions of learning, scientific societies, veterans' associations, divers bar associations, state and national, and even before ecclesiastical assemblies. Of these addresses the greatest from a scientific standpoint was that on "British Institutions and American Constitutions" delivered at Saratoga Springs as the annual address before the American Bar Association in 1892. In this extended address he traced the historic development of the idea of constitutional government as distinguished from that based upon institutions, such as grew up in Britain, and upon this rested the main contention of his political theory; that is, that a written constitution is an agreement among the constituent parties, the terms of which cannot be changed or extended except by the consent of all, and that, therefore, no institutional growth could be predicated of a written constitution, or assigned as a reason for the exercise by a constitutional federal government of any powers not clearly given to it by the instrument which created it.

But his best efforts were put forth in his class-room in his daily lectures to the earnest and enthusiastic young men who came to the Law School from almost every state of the Union. His subjects were Constitutional Law, Equity, Commercial Paper and International Law, but his greatest interest lay in the two former. As a teacher he was delightful beyond de-

scription. Thorough, scholarly, and profound in his treatment of every topic that came up for discussion, he was never wearisome. In the midst of the most abstruse exposition there would come an unexpected flash of wit, or a striking illustration of the principles drawn from his own experience or from some other source, that would illuminate the whole subject and lend to what might have been a mere abstraction, a certain human interest that fixed the memory as well as it delighted the fancy. Indeed, what he was so fond of saying of Lord Westbury as a judge, might well be said of him as a lecturer, "*Nihil tetigit nisi illuminavit.*"

For the purpose of illustrating the rare skill with which he made use of his wide knowledge of general literature in order to light up the darker pages of the law, as well as for the intrinsic interest of the matter, it is proper to set forth an instance that occurred during a lecture on the development of equity jurisdiction. With that rare power of portraiture by word and gesture which was inimitable in Mr. Tucker, he described three picturesque Virginia lawyers of the old school, General William F. Gordon, William Green, and Alexander R. Holladay, and an argument between them concerning the soundness of "Mistress Justice Portia's" decision in the case styled by them "*In Re Shylock.*" This dramatic narrative furnished the setting for this delightful bit of mingled law and literature:

The case of Langford vs. Barnard was decided in the year

1595-'96 (37th Eliz.) Tothill, 134. The Merchant of Venice was published in the years 1598 and 1600. This case brought into collision the claim to the penalty which the law allowed the obligee on a penal bond, or the right of foreclosure of a mortgagee on land (or, "the pound of flesh," it might be), with the decree which equity made, that the penalty should be forbidden, when the thing was offered to be done which the penalty was designed to secure. Will Shakespeare, no more a technical lawyer than my noble old friend, in the offer which Equity, in the person of Portia, made to Shylock to take his debt and release the penalty, took sides with the chancery against the law. He meant to depict the cruel injustice of the law and the perfect justice which chancery afforded by the equity of redemption, and furnished an argument, which has, in the judicature of the English-speaking people, established for three centuries a remedy the Doge of Venice never knew, but which the fair Portia, voicing the broad views of the great dramatic poet, suggested as the true solution of "*in re Shylock*." In the court of law the judgment was wrong on the grounds on which it was made to rest, as Mr. Green insisted; but even in that court was right on the point made by Mr. Holladay, and which Portia did not rely upon. But Shakespeare's Portia showed what jurisprudence ought to be, in staying the hand of the cruel exactor of a mortal penalty, and compelling him to take his debt and be satisfied, thus saving the debtor from the penalty, but requiring him to do justice to the creditor.

Did not Shakespeare, the boon companion of the famous lawyers of the kingdom, write his great drama to show what jurisprudence should be in such a case—to satirize the harsh doctrines of the Common Law, and to vindicate the then recent, and now established, doctrine of Langford vs. Barnard?

It is needless to say that not even the dullest student could fail to catch the legal principle involved, and that not one of his hearers will ever forget the doctrine of Langford vs. Barnard. This incident

also suggests another characteristic of Mr. Tucker as a teacher of law in which he was probably never excelled. While a profound scholar in the law his interest ever centered in persons in preference to mere abstractions, and through all his teaching of abstract principles there ran a thread of personal interest that was captivating to his students. Thus they came to feel that they had a sort of personal acquaintance with Lords Eldon, Hardwicke, Ellenborough and Thurlow, and all the other great masters and molders of equity jurisprudence in England, and to look upon the great principles of equity as successively developed not as mere lifeless ideas, but as the brain-children of these great fathers of the law. So the constitution grew before their eyes under the labors of Madison, Hamilton and Jay; they saw Jefferson and Marshall as they struggled over the molding of the Government under the newly-made instrument, and sympathized with Taney as he bowed his melancholy face before the storm of popular execration aroused by the decision in the Dred Scott case. So they saw it rent and torn by the passions of civil strife, and then restored by the clear-sighted and courageous ministrations of the learned and upright judges that have since adorned the Supreme Court of the United States. Thus under Mr. Tucker's teaching the law became a living organism, full of human interest, as well as an absorbing science calling for the best intellect of the race for its presentation and development.

Mr. Tucker's trial of a jury case in the Lexington courthouse was always held a rare treat for the law students, who attended in a body. And indeed, Mr. Tucker, with his handsome presence and winning manners, was a model as a trial lawyer. Courtly in his bearing toward the judge and his associates at the bar, courteous always in his examination of witnesses, but searching in his questions, he was master of the situation when he came to address the jury. Soon bringing himself into sympathy with the jurymen, he would lighten the tedium of a long trial with witty sallies and clever stories interspersed through his argument, so that he always won the admiration and usually the verdict of the jury.

The interest of Mr. Tucker in his students was seemingly without limit. Though full of affairs he always had time to talk delightfully with the young men who came in great numbers to call upon him, and to advise them wisely upon all the multiform problems that confront the young man just about to enter upon the legal profession. Each year he gave a reception in honor of these students, and those whose work and ability attracted his notice were frequent partakers of the liberal and cordial hospitality of the typical Virginia home which he had set up in a great house that crowned a hill in Lexington. On the other hand, the devotion of the students to "Old Ran"—as they affectionately called him—was beautiful and touching. When at last his end had come the law students asked the privilege of standing guard

over his body; and so it was done from the time his body was brought to the church for the funeral services until the following day when it began the last journey to the final resting place in Winchester.

Every Sunday morning Mr. Tucker was accustomed to lecture on the philosophy of Christianity to the students who gathered in the old Presbyterian church at Lexington. The writer of this sketch vividly recalls the thrill that passed over him when, as a freshman at the University, he first heard the noble words of the white-haired sage as he spoke of the larger meaning of religion, and argued with invincible logic the inevitable truth of the Christian belief; and many young lawyers who have already won a place at the bar in many different states have been heard to acknowledge the great debt they owe to the moral and spiritual uplift that came to them as auditors of these Sunday morning talks of "Old Ran." Mr. Tucker's nature was deeply religious, and his life as pure as his mind was noble and high above all that was mean and unworthy. When a young man of thirty-two he delivered an address before the Young Men's Christian Association of Alexandria which contains as powerful a presentation of the scientific argument in favor of the truth of the Christian religion as can be found in our literature. He was a devoted member of the Presbyterian church throughout his life, and died triumphant in his faith.

In 1891 Mr. Tucker was elected president of the Virginia State Bar Association, and in 1893, presi-

dent of the American Bar Association. The degree of Doctor of Laws was conferred upon him at various times by William and Mary College, Harvard, Yale, and Union College.

Urged on by the insistent desires of his friends, Mr. Tucker began in 1895 the long-intended preparation of a work on the Federal Constitution, but death overtook him before his task was wholly completed. In December, 1896, he suffered a severe attack of bronchitis, from which he seemed almost wholly recovered when he was suddenly afflicted with a severe congestion of the lungs which caused his death on February 13th, 1897. News of his death caused universal sorrow throughout Virginia, and his end was mourned in every part of the United States.

After his death the unrevised manuscript of his work on the Federal Constitution was prepared for the press by Mr. Tucker's son, Henry St. George Tucker, who, true to the example set by his forefathers, had gone early to the bar, had succeeded his father in Congress, and then, after an honorable service in the House of Representatives, came to occupy the vacant chair in the Law School of Washington and Lee University. The work was published in 1899, in two volumes. It contains some errors in relatively unimportant matters, such as may be expected in a posthumous publication, but it has already secured general acceptance as a standard authority, and is recognized as the ablest treatise on the Constitu-

tion from the standpoint of the strict constructionist school.

On the campus of Washington and Lee University, just over against the mausoleum where lies the body of General Robert E. Lee, there stands a beautiful stone structure, the Tucker Memorial Hall. In the library room of this building, which now houses the Law School of the University, is a bronze bust of Mr. Tucker, from the hand of Valentine, while just above it on the wall is a great bronze tablet which best tells the story of the building's erection:

This building has been erected by his friends and admirers throughout the United States to commemorate the life and character of

JOHN RANDOLPH TUCKER

A statesman of sublime courage and loftiest patriotism: a learned and philosophical lawyer: an inspiring and elevating teacher of the law: an advocate of persuasive eloquence: an orator masterful of assemblies: in social graces a Virginian of the old school: in his home ever tender and true: in life he exemplified the highest virtues of the Christian and died exultant in the faith in which he lived.

Born December 24th, 1823; Died February 13th, 1897.

This brief sketch of a noble life may be best closed with the words of a memorial, prepared shortly after Mr. Tucker's death by one of those who knew him best, Professor Charles A. Graves, and adopted by the Faculty of Washington and Lee University:

As a lawyer, Mr. Tucker seized as if by intuition on the pivotal point of a case, and presented it to the court or jury with a clearness and force that were usually irresistible. His mind was acute

and discriminating to a degree never, perhaps, excelled. His learning was extensive and accurate, and he possessed an acquaintance with the English decisions now rarely found. He was a student of the civil law, and urged its study in connection with that of the common law. His arguments before the Supreme Court of the United States elicited the admiration of the judges of that august tribunal; and his views were treated by the court with a deference similar to that shown by the judges of England to those of another great American advocate, Mr. Judah P. Benjamin.

As a teacher, Mr. Tucker's power lay in the presentation of fundamental principles. A theme of interest and importance would arouse him to his highest effort. Then, no matter how difficult and intricate the subject, he would begin at the beginning, trace the doctrine from its source, hold it up to view on every side, and throw upon it such a flood of light that when he concluded it would stand out before the mind with all the clearness of a geometrical demonstration. He never failed to grasp the underlying principles of the law, and his discussions gave not merely the dry bones of decided cases, but were teeming with suggestions, and pregnant with germinal ideas destined to live and expand in the mind of the student, and to bear rich fruit in multifarious applications in practice. Such were his gifts of language and expression, that many of his sentences can be recalled to-day by his pupils, after a lapse, in some cases, of many years.

As a man, Mr. Tucker's characteristic was that he always carried sunshine with him—the radiation of a warm and loving heart. No one could meet him and not be the happier and better for it. His adaptability was marvellous—he said the right thing to everybody. As has been well said, “No man could be in his company and be cast down or depressed, cold or reserved.” No wonder that everyone loved him, and that he numbered devoted friends by the score. He was the most entertaining of men, but mingled instruction with amusement, with “heart-affluence of discursive talk.” His conversation sparkled with wit and rippled

with humor, but he hurt no man's self-love, and his sallies left no sting.

But this was only one side of Mr. Tucker's character, though that oftenest presented to his friends and to the public. He was a man of strong convictions on all subjects, and could on occasion pass "from lively to severe," and be serious even to sternness. He was an indefatigable worker, not trusting to talent, but applying his mind to thorough investigation with the utmost intensity, often sitting up late at night or rising at daylight for the purpose. But above all, he was an earnest, devoted Christian, walking humbly before his God. He felt constant solicitude for the conversion of others, and did all in his power to lead them into the way everlasting. For many years he conducted a Bible class in Lexington, which was largely attended by students of the University and others.

As a citizen, Mr. Tucker was profoundly interested in public questions, and always ready to express his views by speech or pen. He made many addresses, choosing practical but lofty themes, calculated not only to enlighten the mind, but to stir the heart to noble purpose. He was an ardent patriot, and accepting the results of the war, rose far above sectional narrowness in his zeal for the welfare of a common country. But it was upon his native Virginia that he lavished the full wealth of his affection. "God save the Commonwealth" was ever to him an earnest prayer. He ended one of the last addresses he ever made, that before the Richmond Bar Association, with the following touching words:

"For myself, my race is nearly run. But when my head shall rest upon the bosom of this great Commonwealth, near to the spot where I drew my first breath, my last aspiration will be, and I invoke you to join in it, that amid all the evils which environ us, and the dangers that menace us, our venerable mother Virginia shall be protected by God's good providence and guided into paths of peace, prosperity, and glory."

MATTHEW P. DEADY.

MATTHEW P. DEADY

From a photograph taken in 1891, when Judge Deady was sixty-seven years of age.



MATTHEW P. DEADY.

1824-1893.

BY

HARRISON GRAY PLATT,

of the Oregon Bar.

MATTHEW P. DEADY was born in Maryland, May 12th, 1824, of Irish ancestry. His father was a school teacher, teaching in a number of different schools in Maryland, and neighboring states. The son attended his father's school at times, until about the age of seventeen years, when he left home and struck out for himself, learning a trade as an iron worker, working on a farm, attending school, and ultimately studying law, being admitted to the bar of the state of Ohio in October, 1847.

The amount of manual labor which he did during this period supplemented his natural tendencies, and gave him the magnificent physique which undoubtedly contributed largely to his future success, and certainly made him an impressive figure upon the bench.

His practice immediately after his admission to the bar, as is usually the case, was probably of a desultory character and of no great importance, but a year's experience as clerk of the township in which

he lived, undoubtedly gave him experience which was of use to him in the constructive work done by him in participating in the organization of a new community, which so largely occupied him after he became a citizen of Oregon.

He crossed the plains and reached Oregon, then recently organized as a territory, in November 1849. Being practically without means and in debt for a portion of the expense of coming to the Pacific coast, he naturally turned to the occupation in which he had most experience, and taught school for a time until his finances were somewhat replenished. At the same time he gave advice and assistance and participated in the organization of Yamhill County, in which he had taken up his residence, under the territorial organization recently inaugurated.

In 1850 he tried his first case in Oregon at a term of court held at La Fayette, Yamhill County, and although the surroundings were crude, and the court was held in a room in the hotel, yet as he himself has put it in describing this occasion, "the dignity and order of the court, so far as the same depended on the judge, would not suffer for a comparison with Westminster Hall." This remark indicates his attitude toward a court; when later he himself became a judge he was inflexible in maintaining the dignity of the court and the respect due thereto as a court, regardless of the man who might temporarily occupy the judicial position. He expected respect and deference from all who appeared before him, be-

cause he himself revered the courts of his country as the surest bulwark of the liberties of the people.

At the election in June, 1850, Judge Deady was chosen, without the intervention of any caucus or convention, a member of the lower house of the Territorial Legislature, and his influence in that body was immediately felt to a marked degree. It must be recalled that the political life of Oregon was remarkably well developed for so new a country. Other communities subsequently becoming a part of the Union of States, developed as an overflow from adjoining states and were at all times more or less a part of settled and orderly commonwealths and never without some form of government.

Through the neglect of Congress, and the absorption of the political leaders of the day in other, and as it seemed to them, more important problems, the people who had settled in Oregon were left pretty much to their own devices for a number of years.

Out of the necessities of their situation, they had evolved a provisional government fully organized, with a legislature, an executive, and a judiciary, and it must be further borne in mind that this was organized only after a keen contest with the settlers who desired that the Oregon country should become part of the Empire of Great Britain, it being then under the provisions of the joint occupancy clause of the treaty between the United States and Great Britain.

In 1848 Congress tardily organized Oregon as a territory, the act providing that the statutes adopted by the provisional government should be continued in force when not inconsistent with the act, or with any law of Congress, or with the Constitution of the United States.

As stated, at the first session of the legislature in which he participated, Judge Deady's power and influence as a political organizer was manifested. He as the chairman of the select committee to prepare the rules to govern the House, prepared the rules, introduced them and secured their adoption. He was chairman of the Judiciary Committee and of several other committees. The journal of the House, bare as it is, almost a mere chronological record, shows his activity. He not only introduced a very large proportion of the bills, but he secured their enactment, and what is even more significant, very few measures succeeded over his opposition. He was particularly interested in all measures looking to the organization and development of the community, and establishing political and business conditions ready for future development. Among other activities he secured provision for the first census of the territory.

At the close of his first legislative session, Judge Deady, at the request of the territorial secretary, compiled the session laws, and incorporated therewith the laws adopted at the one preceding session of the territorial legislature, producing what is

sometimes known as the Hamilton Code, adopting the name of the then secretary. This was the first legal volume ever published in Oregon, and was to some extent what the name commonly applied to it would indicate, a code, for it included a compilation of the numerous measures necessarily adopted at the first session of the legislature of a newly-organized territory, upon which had fallen the duty of setting in motion the machinery of a government.

Judge Deady's aptitude for politics made him a member of what has sometimes been known as the "Salem Clique," and he was recognized as a member of the so-called "Triumvirate," a trinity of bosses who ruled their party and the territory with an iron hand. While Judge Deady would probably have admitted that he and his associates played the political game to the limit, yet he always insisted that, unlike some more modern bosses, they played it fair.

In the following year he was elected for two years to the upper house of the Territorial Legislature, and served three sessions, being president of that body during the last session and chairman of the Judiciary Committee at the preceding sessions. Much of the legislation of these days was directly drafted by him and, as will subsequently appear, he had a genius for practical and constructive legislation, equal to, if not surpassing, in its effects upon the institutions of the state, the influence of his forty years as a federal judge.

In 1853 Judge Deady was appointed by the Presi-

dent of the United States as one of the judges of the territorial Supreme Court, and served as such until the admission of Oregon into the Union in 1859. The appointment was, of course, made upon the suggestion of the territorial delegate, and there is no reasonable doubt but that the choice was dictated by the desire of the acting delegate to remove from the running one who would have proved a formidable competitor for the next nomination as delegate.

The Supreme Court judges at that time did duty as trial judges in the district courts, for which purpose the territory was divided into three districts. In the assignments of the districts, the southernmost, in which no courts had ever been held, fell to Judge Deady. He organized the court in five counties, he himself opening the records and frequently writing up the entries. Two sessions each year were held in each county, involving travel for more than fifteen hundred miles, practically all on horseback.

During the time he occupied this position, an Indian war raged in this district, and yet in seven years he never missed a term of court, or failed to open court punctually on time. His courage and determination are evidenced by the fact that a white man was tried in his court and convicted for the crime of killing an Indian in an affray, something that certainly never happened before in the western country and very probably has never happened since.

Thirty years later, in the course of a decision holding that an acquittal in the state court, was not a bar

to a trial in the Federal Court, on an indictment for the crime of manslaughter, committed in killing an Indian on the Umatilla reservation, because a different crime was charged, he said:

Most of the Indian wars which have desolated the frontier of this country, in the last thirty years, have been the direct result of crimes committed by a few lawless and savage white men upon Indians, which the local authorities were powerless or indisposed to punish. As a rule, the proceedings in these tribunals have resulted in one judgment for the white man and another for the red one. No white man was ever hanged for killing an Indian, and no Indian tried for killing a white man ever escaped the gallows.

Soon after his appointment, he took up a donation land claim in the Umpqua Valley in Southern Oregon, where he resided with his family, and he himself cultivated his farm during those portions of the year when his judicial duties permitted him to be at home.

The rapid growth of Oregon in population and natural resources created a strong desire for a state government, and in 1857 delegates were elected to a constitutional convention, called and elected for the purpose of preparing a constitution for the future state, and providing for its submission to the electors. Judge Deady was elected as a delegate from Douglas County, and upon the organization of the convention, was chosen as its president.

His influence upon the constitution then framed is admittedly very great, especially in the practical and constructive features of the instrument, and those creating a working and workable scheme of govern-

ment, simple and yet comprehensive and not only well adapted to a simple pioneer state, but sufficient for the future as well. The Constitution of Oregon is based upon the model of the older governments of the eastern states, and is free from that intermingling of what properly should be statutory and municipal regulations with which so many of the newer constitutions are encumbered.

Judge Deady's views on constitution-making were afterwards succinctly summarized by him in the course of an address where he said:

This work of our constitution builders has survived for more than four decades, in all its original symmetry and vigor. Iconoclasts arise who tell us that it was well enough for the day of small things, but that we have outgrown it, that it is inadequate to our present needs, and others who would conform it to their honest yet vague and visionary aspirations for, they know not what. In many of the American states we have witnessed these mutations of the organic law, largely symptomatic of a grave distrust of parliamentary government. As I have said elsewhere: "A constitution properly should contain but few specifications; among a free people, who have earned their freedom, a people who are able to maintain and are worthy of liberty, the fewer the better. A designation of the departments of the Government, a bill of rights, a recognition of magna charta, the petition of right, trial by jury, *habeas corpus*, a specification of the duties of these departments, a few checks; this should suffice. Every step beyond this is an encroachment upon the rights of the people, is an arraignment of the people themselves, is a questioning of their right, or, at least capacity, for self government." And I might have added that this is none the less true that it is accomplished by a species of political *felo de se*, affecting as well a blameless posterity.

If the many restrictions placed in recent years upon the different departments of the state government by their new constitutions are needed, they stand forth as terrible indictments of the servants of the people, of the people themselves.

If these checks are really needed, then has virtue departed from the land. Corporate lust cannot corrupt a people worthy to govern itself. No such bugbear as that is needed to justify these constitutions. If, like the later Roman republic, we are corrupt to the core, fitted only for a Cæsar, if we are rotten before we are ripe, then, indeed is destruction inevitable, and no hand, no checks, may stay the rapid descent.

But I believe these later constitutions are mistakes in attempting to deal minutely with so many varied interests; and our people, with the good sense which is so peculiar to the American, will ultimately recognize this.

For nearly fifty years that constitution stood without an amendment, and without attempt to incorporate therein amendments, other than provisions looking to women's suffrage and prohibition. The constitution then adopted was wisely made difficult to amend. In its present condition, with the amendment embodying therein the initiative and referendum, it will be found unfortunately easy to amend.

The constitution framed by the convention was approved by a majority of the electors at an election held in November, 1857, and became effective as the constitution of the state upon the admission of Oregon into the Union, February 14th, 1859.

Oregon was admitted into the Union at a time when the contest for and against the extension of slavery was at its height, but its constitution prohibited slavery.

Judge Deady was a southern man by birth, education and sympathy, and it has often been asserted that his vote was cast at the convention in favor of permitting slavery in the state. Investigation does not support, but tends to contradict this assertion, and develops that Judge Deady's vote on this proposition was cast in favor of submitting the question to the vote of the people, and allowing them to decide the question. It is probable, however, that he believed the question to be beyond the province of the state to determine for itself, for he unquestionably held that the decision of Judge Taney in the "Dred Scott" case was unanswerable in its exposition of the legal principles governing property in slaves as the constitution of the United States then stood.

The Constitution of Oregon contains a most admirable bill of rights. Complete as when written will it prove to-day, except for the one section relating to free negroes which, of course, has been eliminated by the Fourteenth Amendment of the Federal Constitution.

Considering the anxiety of the people to be admitted as a state, it took courage on the part of the convention to incorporate in the draft of the constitution, that section which reads:

There shall be neither slavery nor involuntary servitude in the state, otherwise than as a punishment for crime, whereof the party shall have been duly convicted.

Note the similarity between this and the Thirteenth Amendment of the Constitution of the United States,

drafted as it was by a senator from Oregon who had been a member of the constitutional convention.

Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Constitution created the usual three coördinate departments of government, legislative, executive and judicial; and the judicial department is most admirably organized.

As a constructive and practical state-builder, Judge Deady was eminently successful in incorporating much of his work into the Constitution, and particularly was he successful, and perhaps even more useful, in some of the matters which his influence successfully kept out of that instrument.

The length of judicial service as fixed by the Constitution was a compromise, Judge Deady believing that the independence of the judiciary would be promoted by longer terms and freedom from the necessity of frequent appeals for reëlection. He did not accept the doctrine that the judges should, like other officers, be kept dependent upon the people, and obliged to justify themselves by frequent appeals for votes. He declared that judges should not be the servants of the people, but servants of the law, and should know no other master than the law. He maintained that the best judge, obliged to appeal often to the voters to retain his position, would occasionally look out of the court house windows to see

which way the wind of popular favor might be blowing.

In seeking to increase the length and stability of judicial tenure of office he was met by the precedent of four-year terms under the territorial government and the tendency on the part of a conservative convention to make few changes.

He succeeded in having the terms extended to six years and lacked only one vote of making them eight.

By his influence, the convention was persuaded to insert in the constitution a clause which requires aliens to declare their intention to become citizens and take out first papers at least one year before being allowed to vote. There was in the convention a strong sentiment in favor of granting at once the suffrage to every person of foreign birth who had lived in the state six months, upon his making his declaration of intention to become a citizen.

Annual sessions of the legislature and a two-year term for state officials were strongly urged in the convention but largely through Judge Deady's influence the constitution provides for biennial sessions of the legislature and four-year terms for the governor and officers of the administrative department.

He earnestly advocated those provisions of the constitution fixing limitations on the power of the state or the counties or cities of the state to create indebtedness and absolutely forbidding the loan of the public credit to any corporation.

These are certainly wise precautions, and pecu-

liarly so in a new community, where the temptation is likely to be especially strong to discount the future by excessive use of the borrowing power.

When Oregon adopted its constitution preparatory to the hoped-for admission into the Union, it also elected a full set of state officers and selected two candidates for the United States senate. Judge Deady who had been a judge of the territorial Supreme Court since 1853, was elected as a judge of the Supreme Court under the state government. Upon the admission of the state and the subsequent organization of a federal court and the new federal district of Oregon, Judge Deady was appointed by President Buchanan as United States District Judge for the District of Oregon, and to accept this appointment, he resigned the position as judge of the state Supreme Court to which he had just been elected.

Notwithstanding the seven years then just passed on the bench, the inquiry is natural why a man with his undoubted talents for political life did not seek to represent the new state in Washington, and it has often been suggested that the unanimity with which the leading men of the state urged his appointment as federal judge was largely influenced by their anxiety to have him out of the race for the position of United States senator.

This motive may have influenced, and undoubtedly did influence those urging his appointment, but Judge Deady himself unquestionably preferred the judicial career, believing himself best qualified for

it. This is confirmed by the fact that subsequently, in 1866, he was offered but declined an election as United States senator when the party leaders who made the proposition could have made good their offer.

That his ambition was judicial rather than political is to be inferred also from the fact that he had already accepted nomination and election as judge of the Supreme Court of the new state, when it is borne in mind that by his influence there had been included in the Constitution a prescribed form of oath of office for judges of the Supreme Court, the last clause of which reads, "and that I will not accept any other office, during the term for which I have been elected."

His commission as federal judge was received in March, 1859, and he immediately qualified, and in the fall opened court at Salem, as was then required. Soon after, he went to Washington and secured the passage of an act locating the court at Portland, where the bulk of the business of the federal court had originated. Soon thereafter he removed to Portland where the federal court has ever since been held. The court was presided over by him, until his death in 1893.

Under Judge Deady, the federal court took and maintained a position in the community of great dignity and influence. He was a tall, large man of fine physique, who made a very impressive appearance on the bench; himself punctilious in every detail, he ex-

acted from every one having business in his court that degree of deference which he believed due, if not to himself, certainly to a court of the United States of America. Unquestionably he magnified his office, as other men have done, when they have found themselves sitting as a representative of the judicial power of the United States, with the strong arm of the national government to enforce their decrees if need be.

His views on the theory of government may be summed up in his own words:

By the time I was thirty years of age, I had pretty thoroughly studied the Constitution and political history of the United States for myself. Among others, I had read Jefferson's works, Webster's and Calhoun's speeches, Washington's Messages, Hamilton's works, and the report of Burr's trial and Chase's impeachment, and Marshall's Life of Washington, and became on general principles, what might be called a federalist—a believer in the doctrine that the Constitution created a government for a nation, supreme in its sphere, and the ultimate judge of its own powers, and not a mere compact between independent and sovereign states, to be terminated at the will or pleasure of either of them.

Few men have the opportunity, and still fewer rise to the opportunity of influencing for all time both the legislative and judicial history of their community, and a man who like Judge Deady was able in a very large measure to do both, certainly possessed the essential characteristics of a great man. Although his participation in legislation as a member of the legislative body terminated in 1853, yet his influence over legislation continued throughout his life

and many of the most important acts of subsequent legislatures were drafted by him.

The legislature of the state in 1862 appointed him Code Commissioner for the state, and under this appointment he prepared a Code of Civil Procedure, which was enacted by the legislature substantially as prepared by him, and stands to-day, with very few changes, a sufficient and satisfactory code of procedure for a great state.

The general incorporation act, under which three or more persons may organize, "to carry on any lawful business," was prepared by him, and enacted by the legislature of 1862 substantially as prepared, and has kept its place on the statute book ever since. This was one of the earliest acts of any state in the United States, putting all business corporations on the same basis, by permitting any three or more persons to incorporate to "engage in any lawful business," and limiting the liability of stockholders to the amount of their subscriptions to the capital stock.

The same legislature adopted other general laws prepared by him, covering among other subjects, partnerships, public roads, the election and qualification of district attorney, sheriff, county clerk, treasurer, assessor, surveyor, commissioner, of the county court, justices of the peace, and constables.

Subsequently he was requested to prepare a Code of Criminal Procedure and a Criminal Code, and report them to the legislative session of 1864. These he prepared, together with a Code of Procedure for

Justices of the Peace Courts, with forms of proceedings, which were enacted practically as reported, and are still in force with comparatively little amendment; and the fact that so little need has arisen for amendment is the surest proof of the wisdom, the deep study and strong practicality shown in the preparation of these codes, involving not only a consideration of the legal principles necessarily involved, but also the practical question of their application to the conditions of society as it then existed, or as it could be reasonably expected to develop.

The importance, too, of Judge Deady's work in constructive legislation is enhanced by the fact that it unquestionably colored and influenced the development of the legal institutions of the subsequently created neighboring states of Idaho and Washington, and by the further fact, that under congressional enactment, the law of Oregon, until very recently, stood as a code for the government of Alaska.

In 1864 by the direction of the legislature, he prepared a compilation of all the laws in force in the state, a task which required and implied a thorough and discriminating knowledge of the past history of the state and its legislation. This code necessarily included not only the legislation of the legislative assemblies of the State of Oregon, but also of the territorial legislature, and of the provisional government which preceded the organization of the territory. The miscellaneous laws of Oregon were to be found in the current statutes from 1843 down to the date of

the compilation. The act of Congress creating the territory of Oregon had as stated continued in force the laws of the provisional government not inconsistent therewith, and the Constitution adopted by the convention of 1857, which became effective upon the admission of the state, had continued in force all prior laws not in conflict therewith. Judge Deady's task therefore, as compiler, involved the determination of what acts or parts of acts were still in force and what were not. He had also to substitute, in such acts and parts of acts as antedated the constitution, the proper officers and tribunals created by the constitution. Thus it will be seen that he is, to an unusual extent, the author of the statutory law of the state. This work involved painstaking labor, accurate knowledge of the legal development of the community, and a careful and judicial discrimination. He did not in the least overstate the difficulty of the work done in speaking of it in the preface of the published volume:

After a long and unavoidable delay, this work is brought to a close. No labor has been spared to make it what the Assembly intended,—a complete compilation of “all the general laws of Oregon” arranged in the order and method of a code.

The reader may never fully appreciate the trouble and difficulty involved in the compilation, in a codified form, of the scattered and oft-amended statutes of the state and territory, covering a period of ten years of almost annual legislation. The change in the nomenclature of offices and officers, and the new distribution of their powers and duties, caused by the transition from a territorial to a state government, made the labor of compiling the stat-

utes of the former period almost equivalent to redrafting them. . . . The dates upon the title page, 1845-1864, refer to the oldest and latest laws of Oregon in this compilation, while those of 1845-1859, surmounted by the motto of the state—" *alis volat propriis*"—I fly with my own wings—refer to the two principal epochs in our history, the first successful establishment of civil government upon the soil of Oregon, and our admission into the Union as a state.

How very satisfactorily the work was done, may be seen from the fact that in substance and form the Deady code has been the foundation of all subsequent codifications, and no complete revision has ever been deemed necessary. The work was greatly increased in its usefulness by legal and historical notes and annotations, prepared by Judge Deady.

In 1872 he was again appointed a Code Commissioner and prepared another codification.

In the two codes prepared by Judge Deady, others were nominally associated with him, but their efforts were addressed to the legislature, while he did the actual work of preparation, much of it without even the assistance of an amanuensis.

In 1864 Judge Deady prepared the first charter for the city of Portland, and this has served as a model in the preparation of most of the charters of the various municipalities of the state.

Through his entire career his aid was frequently sought, and his advice followed, in the preparation of both general and special legislation. Indeed his claim to be remembered for his influence upon the legal institutions and development of the Pacific

northwest rests more on his work as a law-maker than on his career as a judge, though he occupied judicial positions for forty years.

As a judge he was distinguished for enormous industry and painstaking study, rather than for quickness of perception or originality of view. He was not a man whose first impressions were always confirmed by subsequent research, but rather he relied on study and labor to reach a correct conclusion.

His earlier years as a federal judge were years of considerable hardship and deprivation. His salary was small in amount, and practically very much smaller because it was paid to him in greenbacks, and he lived in a community that was on the specie basis. The government of the United States paid him as a judge in depreciated money, while he as a man, was obliged to live and support his family by payments in gold worth more than double his greenbacks. This was not agreeable to a judge who regarded highly the dignity of his position, and felt it incumbent on him to maintain a standard fitting his position.

Owing to the personality of Judge Deady, the federal court, in popular estimation, soon came to occupy a very much higher standing than the courts of the state, and litigants sought the federal court whenever possible to show jurisdiction in that court. It thus happened that it fell to Judge Deady to decide, in advance of any appeal to the Supreme Court of the state, some of the most important questions arising

under the constitution and laws of the state. Taking his place upon the federal bench, contemporaneously with the inauguration of the state government, he was especially well fitted for this work by his familiarity with the questions involved, by reason of his work as president and on the floor of the constitutional convention. Much of the code of the state had been drafted by him individually, and of the general legislation of the state, a considerable part was enacted as drafted by him or after consultation with him.

Titles to property in the city of Portland were in a confused condition by reason of the fact that lands had been bought and sold while the title was still in the United States and the only rights were mere squatter rights. When the Oregon country was originally settled, it was under the joint occupancy of Great Britain and the United States, and no titles could be obtained to real property. When the settlers undertook to organize for themselves a provisional government, and adopted in 1845, the equivalent of a constitution styled the "Organic Act," they incorporated in that act provisions governing the right to occupancy and holding of real property. When Congress organized the country in 1848 and established the territorial government, no provision was made with reference to land titles, and the matter remained in its previous and abnormal conditions until the passage by Congress of the Donation Land Act, granting to married settlers six hundred and

forty acres, and to others three hundred and twenty.

The anomalous situation which had existed, is stated by Judge Deady, in the case of *Lounsdales vs. City of Portland*, decided in 1861, in language afterwards quoted and approved by the Supreme Court of the United States in the case of *Stark vs. Starr*.¹

It is well known that at the time of the organization of Oregon Territory, an anomalous state of things existed here. The country was extensively settled and the people were living under an independent government established by themselves. They were a community in the full sense of the word, engaged in agriculture, trade, commerce and the mechanic arts; had built towns, opened and improved farms, established highways, passed revenue laws and collected taxes, made war and concluded peace.

In the city of Portland, litigation arose involving a contest between claimants under the Donation Act and claimants under rights alleged to have been acquired under the Town Site Act, further complicated by the claims of the heirs of the original patentee as against those deriving their claims through purchase and deed from the settler, prior to the issuance of patent, and prior to the passage of the Donation Land Law.

Numerous cases involving these various questions resulted in a series of decisions ultimately setting at rest the titles involved.

One result of one of these cases was that Judge Deady was compelled to pay owelty on the property in Portland purchased by him for a home. His

¹ 6 Wallace's Reports, 402.

grantor refused to make good under his warranty, and Judge Deady got even with him when he paid off a purchase money mortgage by "greenbacking" him, thereby, however, incurring his enmity.

The enormous grants of lands to railroad and wagon road companies, given by Congress, an empire in extent, were a fruitful source of litigation for the federal court during nearly all of the more than thirty years of his judicial career in that court, and titles to hundreds of thousands of acres rest on his interpretation of the congressional grants.

The case of *Marx vs. Hanthorn*² became and remains a leading case upon the interpretation of the law relating to taxation and the effect of tax deeds. This case was appealed to the Supreme Court³ and the judgment of the lower court affirmed, although for different reasons than those considered in the opinion of Judge Deady.

Another very important case where the Supreme Court arrived at the same conclusion as Judge Deady, although not accepting his premises, was the case of *Pennoyer vs. Neff*,⁴ which put at rest the question as to the extent of the jurisdiction acquired by substituted service.

Holding court at a railroad center where three lines of transcontinental railroads meet, besides numerous lines of water transportation, in a city which

² 30 Federal Reporter, 579.

³ 148 United States Reports, 172.

⁴ 95 United States Reports, 714.

is a seaport where come numerous ships from all parts of the world, Judge Deady was called on to consider a wide range of questions, involving important principles of general application. Thus soon after the enactment of the Interstate Commerce Act, Judge Deady laid down the now accepted proposition that the long and short haul clause of that act did not prohibit a carrier from meeting the competition of other lines.

In 1885, more than two years prior to the Interstate Commerce Act, the legislature of Oregon passed an act prohibiting a railway within the state, from charging a greater rate for carrying similar property for a short haul, than a long one in the same direction. In considering this act of the state legislature, Judge Deady held,⁵ that notwithstanding this act, the railroad might, for the purpose of retaining and securing business at a point or place where there are competing lines and transportations, charge less for a long haul than a short haul in the same direction, so long as the charge for the latter is reasonable. In this opinion he used language which is interesting in view of recent discussion and legislation with regard to rates:

I assume that the state has the power to prevent a railway company from discriminating between persons and places for the sake of putting one up or another down, or any other reason than the real exigencies of its business. Such discrimination, it seems

⁵ *Ex parte Koehler*, 31 Federal Reporter, 315.

⁶ *Ex parte Koehler*, 23 Federal Reporter, 529.

to me, is a wanton injustice, and may therefore be prohibited. It violates the fundamental maxim, which in effect forbids any one to so use his property as to injure another, *sic utere tuo ut alienum non lædas*.

In the opinion in the later case under the Interstate Commerce Act, he said: ⁷

The Interstate Commerce Act is intended, among other things, to prevent discrimination between long and short hauls, except where they are made under substantially dissimilar circumstances and conditions. In my judgment, Congress, in limiting the prohibition contained in Section 4 of the act against discriminating charges between long and short hauls, to cases where such hauls are made, "under substantially similar circumstances and conditions," has recognized the rule laid down in *Ex parte Koehler* ⁸ as a proper one. Freight carried to or from a competitive point is always carried under "substantially dissimilar circumstances and conditions," from that carried to or from non-competitive points.

He was also called upon to decide cases in admiralty. In "*The Canada*" ⁹ he held, declining to follow the decisions to the contrary, that on principle the services of a stevedore are maritime in their nature, and can be recovered from the vessel, a proposition now universally accepted.

Judge Deady sat in the California circuit in the hearing of some very important cases. Notable because of the prominence of the parties, was the case of *Sharon vs. Hill*, ¹⁰ where Judge Deady delivered

⁷ 31 Federal Reporter, 315.

⁸ This was the case arising under the state law; both cases are known as *ex parte Koehler*.

⁹ 7 Federal Reporter, 119.

¹⁰ 26 Federal Reporter, 337.

the leading opinion of the court, concurred in by Judge Sawyer. This was a suit commenced by Sharon, who was a senator of the United States from the state of Nevada, against Sarah Althea Hill, to have cancelled and declared null and void, as false and forged, an alleged written agreement constituting a marriage contract between the plaintiff and defendant. The same judges had previously overruled a demurrer to the bill, on the ground that the instrument if false or forged, might thereafter be used to maintain a false claim to an interest in the plaintiff's property at a distance of time when the proof of its fraudulent character was unobtainable. The analysis of the testimony and discussion of the principles of law applicable thereto, are very complete and careful and left nothing further to be said.

In conclusion, after determining that the relations between the parties did not constitute a marriage, and that the writing in question was false and forged, he thus pays his respects to a community permitting marriage by secret contract:

But I cannot refrain from saying, in conclusion, that a community which allows the origin and integrity of the family, the cornerstone of society, to rest on no surer or better foundation than a union of the sexes, evidenced only by a secret writing, and unaccompanied by any public recognition of each other as husband and wife, or the assumption of marital rights, duties, and obligations, except furtive intercourse, more befitting a brothel than otherwise, ought to remove the cross from its banner and symbols, and replace it with the crescent.¹¹

¹¹ For the dramatic sequel to this legislation, in the murderous attack on Justice Field, see essay on Stephen J. Field, *supra*, p. 38.—Ed.

Judge Deady also sat with Judge Sawyer in what are known as the "debris" cases,¹² in which it was sought to assert a right, on the part of mining companies, by prescription, to discharge mining debris into navigable rivers, filling up their channels, injuring their navigation, and thereby overflowing and covering with debris lands of property owners along the shores of such rivers. The case was memorable because of the magnitude of the interests involved, and the great wealth and power of the mining companies with reference to which Judge Deady used this language:

After a personal examination of the mines, mining operations, water ways, and the adjacent country, I am by no means unconcerned or indifferent to the effect of this decision upon the large capital invested in these mines. But it is a fundamental idea of civilized society, and particularly such as is based upon the common law, that no one shall use his property so as to injure the right of another,—*sic utere tuo ut alienum non laedas*. From this salutary rule no one is exempt, not even the public,—and the defendants must submit to it. Without it the weak would be at the mercy of the strong, and might make right.

The quotations which have been made from opinions of Judge Deady illustrate, and very many other quotations might be made, likewise illustrating, his natural tendency to decide his cases if possible, by the application of a principle, rather than by merely following as a precedent what some other judge had decided, in what was apparently a similar case. To a virile and independent mind, it seemed to him

¹² 9 Sawyer's Reports, 441.

more natural to think matters out originally, upon principles of sound reason, and thus arrive at a conclusion, rather than merely adopt a precedent, regardless of its source or weight.

This occasionally has led him to decisions contrary to the weight of prevailing authority. As for instance in the case of *Daub vs. Northern Pacific Railway Company*,¹³ where he held that the mate of the steamboat was not the fellow-servant of the deck-hand who had been injured.

In the case of *Gilmore vs. Northern Pacific Railway Company*, Judge Deady said:¹⁴

Beginning with, . . . and *Farnwell vs. Boston & Worcester Railroad*,¹⁵ the rule was established that a master or employer was not responsible for an injury¹⁶ sustained by his servant or employee in consequence of the negligence of a fellow-servant, as to the employment and retention of whom the former had exercised due diligence and care; but that the liability to injury by such means was one of the risks incident to the employment, and that a "fellow-servant," within the meaning of the rule, were all persons employed or engaged in the same common service, from the highest to the lowest, and who are subject to the same general control. But in the progress of society and the general substitution of ideal and invisible masters and employers for the actual and visible ones of former times, in the form of corporations engaged in varied, detached, and widespread operations, as in the construction and working of long lines of railway, it has been seen and felt that the universal application of the rule often resulted in hardship and injustice. Accordingly, the tendency of

¹³ 18 Federal Reporter, 866

¹⁴ 18 Federal Reporter, 866.

¹⁵ Citing, 4 Metcalf's Massachusetts Reports, 49.

¹⁶ Citing, Wood, Master & Servant, p. 407.

the more modern authorities appears to be in the direction of such a modification and limitation of the rule as shall eventually devolve upon the employer under these circumstances, a due and just share of the responsibility for the lives and limbs of the persons in its employ.

But the courts of the state of Oregon have adopted a rule so far the other way, that it has been virtually impossible for an employee of a railroad company to recover from his employer, for injuries received, if the cause of such injuries could be traced to the negligence of any other employee of the common master.

The holdings of Judge Deady keep at least within hailing distance of reason, and if followed, would free the law of master and servant of those subtleties and refinements of the fellow-servant doctrine, which have evolved from, but which have no reasonable or logical relationship to, the decision of Judge Story to which the whole fellow-servant doctrine in the United States harks back as its source.¹⁷

Judge Deady's decision, although contrary to the weight of authority, is in harmony with the statute subsequently enacted by the legislature of Oregon, in 1903, imposing upon railroads some degree of responsibility for the lives and limbs of their employees. It is certainly remarkable that under the prevailing fellow-servant doctrine the ability of railroads to select competent employees, ends at the very same point which limits their responsibility for injuries

¹⁷ 1 Deady's Reports, 233.

resulting from the acts of incompetent employees.

One of the most famous cases ever decided by Judge Deady was the case of McCall vs. McDowell,¹⁸ in which he held "that Congress alone had the power to suspend the writ of *habeas corpus*, and that the attempted suspension of the writ by the President without the authority of Congress, September 24th, 1862, was illegal and void." The facts of the case were these: In April, 1865, General McDowell, who was in command of the United States troops situated in California, issued a general order for the arrest of all persons, of whom unfortunately there were a number, indulging in public rejoicing over the assassination of President Lincoln. Under this order McCall was arrested for using prohibited language and was confined in Fort Alcatraz. He was finally discharged from imprisonment and brought an action for damages against General McDowell and his subordinate officer who made the arrest.

In view of the excited state of public opinion, it required courage for the Judge to declare the law as he found it, and hold that the arrest of McCall was illegal and unwarranted, because as a matter of fact, the President had not authorized McDowell to make the arrest in question, and therefore he could not claim the benefit of the act of 1863, giving power to the president to cause arrests to be made in particular cases, without the cause thereof being subject to inquiry on *habeas corpus*. Judge Deady declared:

¹⁸ Deady's Reports, 233.

The power of arbitrary arrest is a very dangerous one. In the hands of improper persons it would be liable to very great abuse. If every officer throughout the United States during the suspension of the *habeas corpus* is authorized to arrest and imprison whom he will, as "aiders and abettors of the enemy," without further orders from the president, or those to whom he has specially committed such authority, the state of things that would follow can better be imagined than described.

At the same time, he held,

that the action could not be maintained against the subordinate officer because he was acting in obedience to the orders of his military superior.

But in discussing the question of damages, he said :

In this case the arrest and imprisonment of the plaintiff, although without authority of law, was, as I may say, procured and provoked by conduct on his part at once dangerous and disgraceful, and well calculated at that moment of intense public feeling and anxiety to have brought harm on himself and the community.

Talk and reason as we will about the liberty of speech, something is due to society from every reasonable being, who enjoys its protection and privileges. At least, in such an hour of public sorrow and alarm as that which followed the assassination of the president of the Republic during the dangers of a civil war, the plaintiff, whatever his political prejudices or opinions, should have bridled his tongue so as not to exult at the calamity of the nation, or mock at its fear.

In the case of *Avery vs. Bigler*,¹⁹ decided a short time before passage of the Tenure of Office Act, Judge Deady discussed thoroughly the constitutional questions governing the removal of incumbents from

¹⁹ 1 Deady's Reports, 204.

federal office, holding that as the appointing power under the Constitution includes both the President and Senate, the President nominating, and by and with the advice of the Senate appointing, under the Constitution the President alone could not remove from office, but such removal must likewise be consented to by Congress. This decision was made notwithstanding the fact that Congress had long acquiesced in the assumption of power on the part of the President to remove.

In the case of *Boyle vs. Case*,²⁰ action for damages was brought by the victim of a vigilance committee, and while the case does not involve any new or controverted principle, it well illustrates Judge Deady's firm attitude in favor of the supremacy of the law at all times and under all circumstances.

In charging the jury, he said:

Much has been said to you in this connection by the leading counsel for the defendants, in extenuation, if not in justification, of vigilance and citizens' committees, and it is maintained that there are times when the people of a place are justified in taking the law into their own hands, and administering justice in obedience to the methods of a higher law than that found in the books. But, gentlemen, we are here as the ministers of the law of the land, and we do not know or recognize any other. We have taken a solemn oath to administer this law and be governed by it in the determination of this case. When we loose our hold on this storm-tried anchor we are adrift, without rudder or compass, on the dangerous sea of prejudice, passion, and falsehood.

His ability to get beneath names and forms and

²⁰ 18 Federal Reporter, 880.

grasp the real substance of a controversy, is illustrated in the case of *Martinetti vs. Maguire*.²¹ The plaintiff, as the alleged owner of the play called the "Black Rook," sought to restrain defendant from exhibiting a play called the "Black Crook," claiming it to be a mere imitation of the other. After discussing the evidence, and holding that, under the evidence, it was true that one was a colorable imitation of the other, the court disposed of the case in this way—

But, if this play is a "dramatic composition," within the purpose and meaning of the act of Congress, the motion of the claimants for an injunction should be allowed.

But I do not think it such a composition, it is a mere spectacle. The dialogue is very scant and meaningless, and appears to be a mere accessory to the action of the piece;—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress, or no dress, and in attractive attitudes or action. To call such a spectacle a "dramatic composition" is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts, or an exhibition of *model artistes*, might as justly be called a dramatic composition. Like those, this is a spectacle, and although it may be an attractive or gorgeous one, it is nothing more. In my judgment, an exhibition of women "lying about loose," or otherwise, is not a dramatic composition, and therefore, not entitled to the protection of the copyright act, and the relief sought for denied.

Judge Deady was often called a "prosecutor," a judge before whom a criminal had a hard time, and this was true to the extent that if he believed the pris-

²¹ 1 Deady's Reports, 216

oner guilty he made use of all the power and influence of the court to prevent the escape of a guilty man from punishment by the ingenuity and subtlety of the criminal lawyer. His theory of the administration of criminal law was that certainty of punishment would accomplish more for the protection of society, than the infliction of severe penalties, and while he bent every energy possible to a judge to bring about the conviction of a criminal, his sentences were usually moderate.

Notwithstanding the fact that he could not be deterred from doing what he believed to be his duty, it is apparent that he was not impervious to criticism, from the language which he used in referring to a criticism that had been made of decisions rendered by him in certain *habeas corpus* cases:²²

The case of Lee 'Tong is referred to in the discussion of "*habeas corpus*," at the meeting of the American Bar Association for 1884, as a "flagrant" one—whatever that may mean.²³ But beyond this ornate epithet, the criticism went no farther than to complain of the act of 1867, by which the jurisdiction in question was conferred on "the lowest class of federal judges." But it is not denied that the jurisdiction is conferred, and, therefore, no "federal judge," however "low" he may be in the judicial hierarchy, can decline to examine it when a case is brought before him. But if the jurisdiction to discharge a person from imprisonment, who is deprived of his liberty, without due process of law, by a state, was not conferred upon the district and circuit judges, this provision of the fourteenth amendment, that was plainly intended as a bulwark against local oppression and tyranny,

²² The Laundry License Case, 22 Federal Reporter, 701.

²³ Citing, American Bar Association Reports, vol. XXIX, 30.

as well "up north," as "down south," would be a dead letter. The Supreme Court is too far away, and the way there is too expensive, to furnish relief in the great majority of cases, either upon a direct application or on an appeal from the state court.

A complete review of Judge Deady's judicial decisions has not been attempted. No judge could sit on any bench for nearly four decades without committing some error, without sometimes laying down rules that other judges could not approve. Judge Deady certainly maintained a high standard of excellence. His decisions give proof of indefatigable industry, wide research, and accumulated learning.

Not many years prior to his death, he was offered an appointment as circuit judge, a well-earned tribute to years of faithful and useful service as district judge. Because of impaired physical health, he felt obliged to decline, believing himself unequal to a work involving so much travel as is necessary in the ninth circuit.

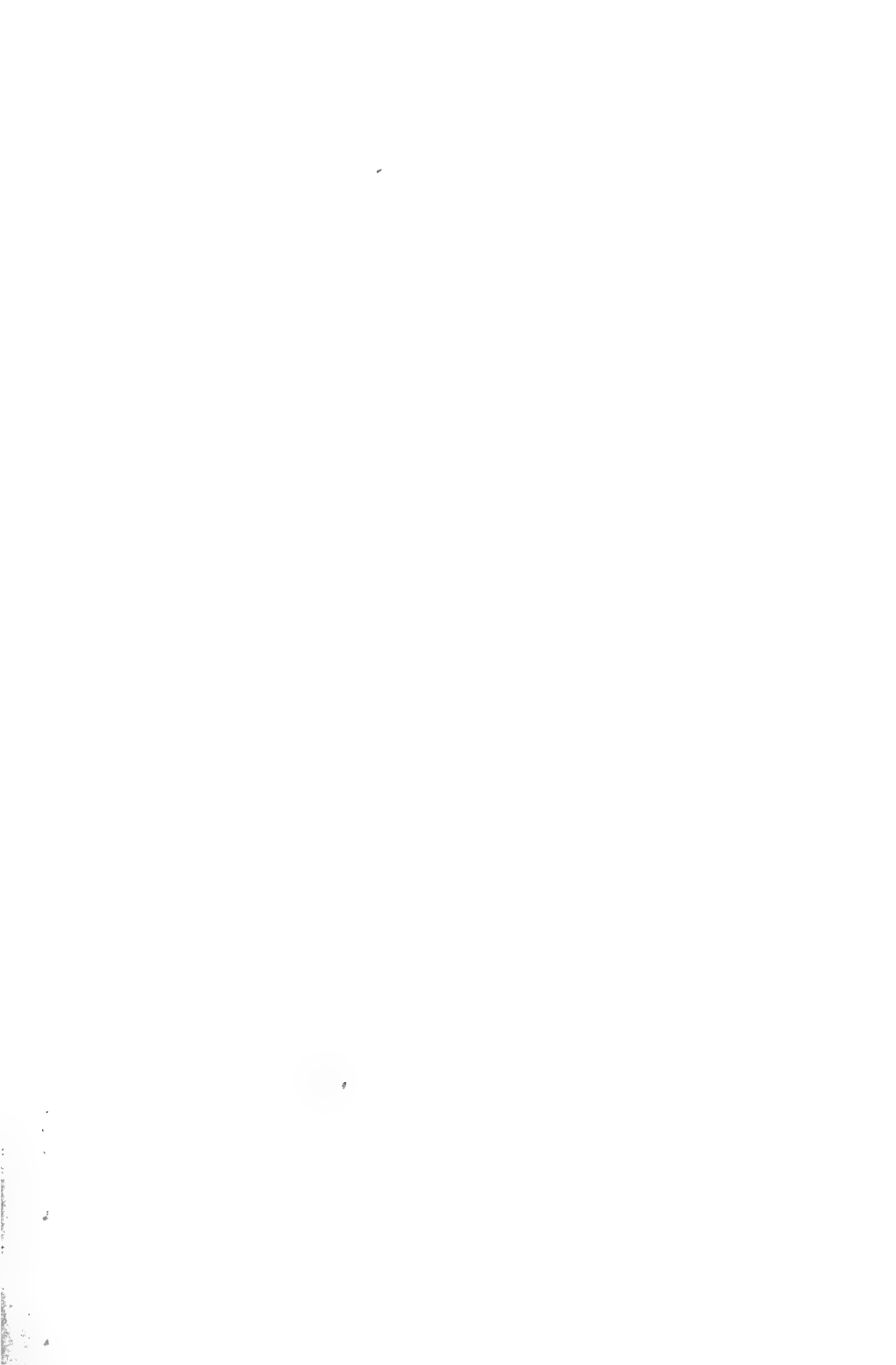
It is no detraction from his eminent services as a judge to say that his influence on the legal development of Oregon and the Pacific northwest was greatest by reason of his participation in the making of the Constitution of Oregon, the codes prepared by him, and his work in preparing and shaping much subsequent legislation. But it is as the judge of the federal court that he is best and most widely known.

For nearly forty years he represented the judicial power of the United States, under the Constitution, in Oregon, and at times in neighboring districts, and

his influence was not limited to the confines of his judicial district. His opinions mark the advance of the community in dignity, influence and material prosperity. His decisions and his influence developed the constitution of the state, influenced its legislation, and interpreted and established many of the most fundamental principles of rights and property.

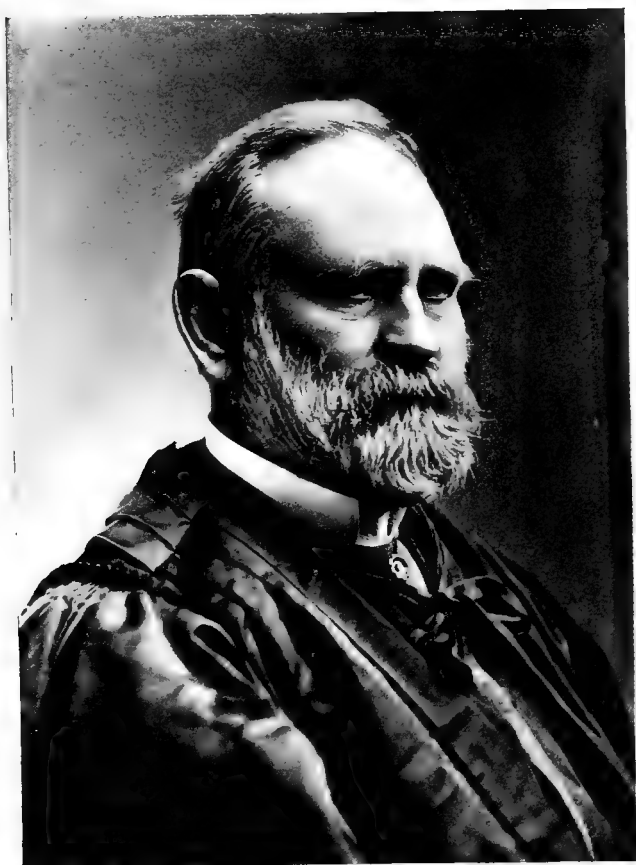
To few men is given the opportunity to develop their powers and evidence their usefulness at the time of the making of a commonwealth, and to fewer still is given the ability and personality to make so powerful an impress upon the institutions and life of that commonwealth as did Matthew P. Deady.

STANLEY MATTHEWS.



STANLEY MATTHEWS

From a photograph by Bell of Cincinnati, 1886.



STANLEY MATTHEWS.

1824-1889.

BY

CHARLES THEODORE GREVE,

of the Ohio Bar.

THOMAS STANLEY MATTHEWS was born in the city of Cincinnati, Ohio, July 21st, 1824. His first name, used by him during his early boyhood, was dropped when he came to manhood, perhaps for the whimsical reason he gave to Governor Hoadly who had joked him about it, "My father's name was Thomas, and he opened my love letters," perhaps for some less cogent reason. At all events this great son of Ohio was known throughout his life both by his intimates and the world as Stanley Matthews, and the name Thomas Matthews has ever been identified with his father, a man whose name in his day and community was as well and favorably known as was at a later time, that of his distinguished son, the senator from Ohio and justice of the Supreme Court of the United States.

Thomas Johnson Matthews, the sire of a distinguished offspring, and a most important formative influence in the lives of a large number of disciples who had a great share in the molding of the public

mind of their time, was of Quaker parentage, born in Leesburg, Virginia, January 26th, 1788. His youth was spent in part in Alexandria, Virginia, and later in Philadelphia from which city he came to Cincinnati in 1818. Here he devoted himself to teaching, being associated at times with the well-known educators John L. Talbott and Milo G. Williams. In 1823, shortly after his marriage to Isabella, the daughter of Colonel William Brown, he was elected Morrison Professor of Mathematics and Natural Philosophy in Transylvania University at Lexington, Kentucky. The university was then in its prime, with full faculties of law, literature and medicine, men of whom it has been said "a greater array of strength, of brilliant talents and wide reputation, has scarcely ever been collected at one time and in one institution." The fame of the university spread throughout the world and visitors, native and foreign, made pilgrimages to this remarkable seat of learning with its large library—one of the best in the land,—its anatomical museum, its natural history collection and its botanical garden. In the faculty were such men as Dr. Charles Caldwell,—the American "Spurzheim," Dr. Daniel Drake, the remarkable genius Rafinesque, and Dr. Joseph Buchanan.

"At this time," says Timothy Flint, speaking of Lexington, "literature was most commonly the subject of conversation. The best modern works had been generally read. There was an air of ease and

politeness in the social intercourse of the inhabitants of this town, which evinced the cultivation of taste and good feeling." In the very year of Stanley Matthews' birth, Foote complains that in the matter of talents, learning and enterprise, the "State of Ohio" was "tributary to Lexington," then called the "Athens of the West."

In this center of culture Thomas Matthews was cordially welcomed and here for eight years he lived,—the first eight years of the life of his son Stanley. Young as he was he could hardly have escaped the influence of such surroundings and the youthful impressions received there undoubtedly affected his mental development. During the residence of Professor Matthews in Lexington, he surveyed the disputed line between Kentucky and Tennessee from Cumberland Gap to the Tennessee River, and also assisted in laying out the railroad from Lexington to Frankfort. He was also for a time editor of the "Transylvania Literary Journal" and projected the mathematical department in Cincinnati's "Literary Cadet," where he printed a lecture on Symmes' theory of "concentric spheres."

In 1832 Professor Matthews was elected to the presidency of Woodward High School, afterwards Woodward College, in Cincinnati, being the first to hold that position. After three years' service, he resigned to become an active officer of the Ohio Life Insurance and Trust Company. In 1845 he became Professor of Mathematics and Astronomy in Miami

University at Oxford, Ohio, where he remained until a few months before his death in 1852.

Thomas Matthews was most enthusiastic and conscientious in his work, with an unusual faculty of inspiring his students. No man of his time in the west attained a higher reputation as a teacher.

The mother of Stanley Matthews was a daughter of Colonel William Brown, one of the pioneers who came from Connecticut to the little village of Columbia, now a part of Cincinnati, with the first settlers of Hamilton county, in 1788, as one of that party of whom Judge Burnet says, "they were all men of energy and enterprise." Colonel Brown was active in the life of the early pioneers. His name appears signed with other names to a curious public notice issued in 1794, offering rewards varying from ninety-five to a hundred and thirty-six dollars "for every (Indian) scalp having the right ear appendant."

Colonel Brown's Connecticut ancestors were among the prominent citizens of that state, one of them having been a member of the Colonial Assembly as early as 1665. It is apparent therefore that the remarks of Colonel Breckinridge at the Matthews memorial exercises held in the United States Supreme Court room were entirely justified.

There is something extraordinarily precious in having been born into a scholarly family: something sweet as well as valuable in your earliest memories going back to the familiar library shelves, to having reminiscences of silent playmates in the old books with

which your father was in the habit of dealing and associating in your earliest childhood. There is an unconscious power of development in the atmosphere of literature and learning, precisely as a flower develops under the unconscious influence of light and sun.

Stanley Matthews was born into the family of a learned and scholarly gentleman. His early life at Lexington was at a period when there was a great deal of intellectual activity; and we are not just when we think that the little children that are around our knees and that gather at the outskirts of a crowd do not develop under what they see and hear; that the years from five to eight or nine are not sometimes very important formative years.

Stanley came with his father to Cincinnati in 1832, where he attended the newly-established Woodward High School, studying for a time under his father and later under the well-known Joseph Ray and Alexander H. McGuffey. The institution expanded into Woodward College in 1836, and here he prepared himself for the junior class of Kenyon College at Gambier, Ohio, which he entered in 1839 and from which he was graduated in 1840. Here we are told he especially excelled in the study of the classics, and in this study he laid the foundation of the clear and forceful style that gave such impressiveness to whatever he said and wrote. Here too he made the acquaintance of Rutherford B. Hayes and a lasting friendship was formed that subsequently influenced greatly the lives of both men.

After graduation he returned to Cincinnati and spent two years in the diligent study of the law and also in the cultivation of friendships that were to be of lasting influence.

In 1842, with his brother Charles E. Matthews, afterward a mathematician of renown, he taught school in Maury county, Tennessee, in the Union Seminary near Spring Hill, conducted by the Reverend John Hudson. Here it was that he formed the intimate acquaintance of Mary, daughter of James Black, a prosperous farmer and leading citizen of the county, whom he married in February, 1843.

Here, too, he edited for a time the "Tennessee Democrat," in the interest of James K. Polk, its owner, then a candidate for the presidency. His political associations at the time were not of a congenial nature, as may be assumed from his subsequent career.

He also practiced law a little at Columbia, at a bar unusually strong for such a community. It contained such men as James K. Polk, who was subsequently elected President of the United States; Polk's partner, James H. Thomas, who afterwards for two terms represented the district in Congress, one of the best common-law lawyers of his time; Terry H. Cahal, subsequently chancellor of the state; Alfred O. P. Nicholson, editor of the Washington Union, twice sent by his state to represent her in the United States Senate, and who died chief-justice of the state; Samuel D. Frierson, elected chancellor by the Legislature years afterwards; Frierson's young relative, William Frierson Cooper, subsequently chancellor of the Nashville district and later judge of the Supreme Court; Russell Houston, for

many years past counsel of the Louisville and Nashville Railroad Company, and Gideon J. Pillow, a very successful lawyer who figured in two wars. The young lawyer made a most favorable impression upon these men, especially upon the brilliant Cahal, who, moved by generous impulses, said to him one day that the place was too small for a man of his capacity; that he should return at once to Cincinnati, which was then the growing city of the west, where, he was assured, in a few years he would rise high in his profession if he should pursue the proper course. This advice he acted upon, and it was the turn in the tide of his life which led on to fortune. Before very long he ranked at the bar of that state with Ranney, Waite, Thurman, Hoadly, Taft, Stanbery, Pugh and Groesbeck.¹

The friendships formed in Tennessee were of great value to him at a time many years later, when his name was under consideration by the Senate of the United States for the vacant seat on the Supreme Bench.

Stanley Matthews returned to Cincinnati in 1844 and being admitted to the bar a year later, he at once formed a partnership of brief duration with Samuel B. Keys and Isaac C. Collins, the latter at a later date a judge of the Court of Common Pleas. The president judge at that time was the distinguished William B. Caldwell whose intercession in behalf of Matthews procured for him an appointment as as-

¹ W. S. Flippin at Matthews' Memorial, April 6th, 1889.

sistant prosecuting attorney of the county. During his absence in Tennessee he apparently did not entirely abandon his Cincinnati connections since his name appears in the directories of those years as a law student boarding with his father on Ninth Street between Vine and Race. As late as 1848 he seems to have retained the name "Thomas" as he appears both as Stanley and as T. S. Matthews, having an office according to the directory of that year on the west side of Main street between Front and Second Streets.

His principal activity however during the first five years after his return to his native city (1845-1850) was in the line of politics rather than of law. The location of the city on the line between the land of freedom and that of bondage necessarily made the slavery question a burning one to its citizens, who in the main felt a warm sympathy for their brethren of the south. Many of the leading families of the city were of southern origin and others were connected with that section by ties of marriage, friendship and social relationship, as well as by the strongest bonds of commercial interest. Slavery existed at the city's very doors, but the institution of slavery as it was developed in Kentucky, lost much of its repulsive character, and the apparently contented condition of most of the slaves, and the almost all-prevailing idea of the inferiority of the black race, developed a general policy of "let well enough alone." The people of that day and locality were confronted with a con-

dition and not a theory, and the condition as they saw it had become so much a matter of course that they resented any undue discussion or excitement about the theory. The abolitionist was regarded as a fanatic who sought to do impossible things, and his conduct was felt to have no other result than to strain the relations between the various sections of the country. Negro colonization rather than abolition was the remedy that appealed with the greatest force to the respectable Cincinnati merchant and "abhorrence meetings" were popular at which prominent citizens of the leading parties formally resolved that the colonization plan was the only sure and safe and feasible project to avoid the ills of slavery, and that the abolitionists were pursuing a course calculated to prevent all amelioration of the condition of the colored race. As late as 1842 a list of abolitionists in the city was published for the purpose of informing southerners whom to avoid in their business dealings.

The opponents of slavery however though few in number were active. In the middle thirties the slavery issue caused the split in Lane Seminary in whose faculty were such men as Lyman Beecher, Calvin E. Stowe, and Theodore D. Weld. In 1836 Birney moved his "Philanthropist" newspaper to the city, a proceeding which profoundly disgusted the southern sympathizers and resulted finally in a riot and the destruction of the printing establishment by the mob. The establishment was again sacked in 1841 at which

time the paper was edited by Dr. Gamaliel Bailey, who had been Birney's associate. During the next few years came the period of Chase's greatest activity as a lawyer in behalf of the colored people. It is not strange, therefore, that Matthews, always a close friend and follower of Chase, should have been drawn into sympathy with the movement known as the Liberty Party, to which he was thoroughly converted by the writings of Dr. Bailey. Always a firm believer in the supremacy of law, he, as Chase, insisted upon the pursuit of constitutional remedies, rejecting the extreme views and methods of the immediate followers of Garrison. In 1845 he was one of the State Committee and assisted in editing its organ "The Democratic Standard and Whig of 1776." When in the latter part of the next year, 1846, Bailey moved to Washington to take charge of the "National Era," taking with him the valuable subscription list and weekly edition and support of the "Daily Herald,"—the old "Philanthropist," Matthews succeeded him in the editorship of the "Cincinnati Morning Herald," a newspaper devoted to the peaceful and constitutional extinction of slavery. He and his associates were not possessed of large funds and although they were assisted by loans from a few anti-slavery friends, the enterprise was abandoned in a little over a year. Yet one who knew him held that he owed much of his forceful utterance in the forensic field to his editorship of that early Cincinnati paper, the Herald."²

² R. D. Mussey.

In 1848 he was an editor of the "Cincinnati Globe," a daily and weekly paper.

The contest in the Ohio legislature in the winter of 1848-49 which ended in the election of Salmon P. Chase to the United States Senate is national history. In this contest Matthews though less than twenty-five years of age, was Chase's lieutenant and manager and to him was largely due the successful coalition of Free Soilers and Democrats. His own reward came a few months later. On January 3d, 1849, he was elected to the clerkship of the House of Representatives. Two years later he was a candidate for reelection to this position in the following legislature, but owing to the change of party control, was unsuccessful.

In October, 1851, he was elected as one of three judges of the Court of Common Pleas of Hamilton County, the first judges to serve under the new Constitution, which for the first time required that all the judges should be lawyers. Although the salary at this time was but fifteen hundred dollars a year, the election of this young man of twenty-seven who had had but little or no actual experience in practice, serves to indicate the esteem in which he was held by his fellow-citizens. On account of the inadequacy of the salary he resigned in January, 1853. He immediately associated himself with his old preceptor Vachel Worthington, one of the leaders of the bar. The partnership of Worthington and Matthews continued until shortly before the outbreak of the

war. In 1855 he was elected a member of the Ohio Senate for the term of two years.

In the year 1859 came domestic sorrows which had much to do in molding his religious opinions for the rest of his life. George Hoadly, in writing of this period of his life, says :³

Until the year 1857 Stanley Matthews had been a Rationalist, of some form or other, in religious opinion. In that year he buried in one grave three children, and this calamity, which overwhelmed him for a time almost to the upsetting of his mental equipoise, led to his re-examination into the foundations of opinion upon the most serious of subjects. His father had been a Unitarian, and he if not a member, at least a habitual attendant at a Universalist Church when this calamity overtook him. He came out of the struggle a Calvinistic Presbyterian, holding opinions which he never yielded, and in the faith of which he died.

In 1858 Matthews was appointed by President Buchanan to the office of United States Attorney for the Southern District of Ohio, which position he held until after the inauguration of President Lincoln.

While holding this position he was called upon in the regular course of his official duties to prosecute a case that afterwards was of considerable importance in his career. A reporter on a local paper named Connelly, was indicted for aiding in the escape of two fugitive slaves. The trial was held before Judge Leavitt, the United States District Judge, and Matthews of course was obliged to prosecute the case on behalf of the government. The attorneys for the defense were Thomas Corwin and J. B. Stallo.

³ Remarks at Matthews' Memorial.

As there was no question as to guilt the man was convicted and received a light sentence and a small fine. The case had aroused much public interest and the prisoner became the hero of the day. He was given the best room in the jail, and visited by the ladies of fashion and people of distinction. The teachers of the public schools headed processions of children and ministers of the churches called upon him in organized bodies. The Methodist Conference then in session, and later the Unitarian Conference, with Horace Mann at its head, also visited him in his place of confinement. At the expiration of his imprisonment he was escorted from the jail by a large torch-light procession headed by a band of music and a number of carriages conveying distinguished citizens. The celebration concluded with speech-making in a large public hall.

The prosecution of this case was used against Matthews both at the time of his congressional race in 1876, and later when his name was under consideration by the Senate for the appointment to the Supreme Bench. Matthews simply performed the duties that he had assumed with his office, and that he did not relish them was understood at the time by those who knew him. Even Levi Coffin, the head of the "Underground Railroad," bore tribute to his sympathy with the anti-slavery cause at the very moment of this prosecution. The incident was distorted by the malignity of political and personal opponents who refused to distinguish between the position of an

officer charged with the enforcement of an obnoxious law and sympathy with the law.

Matthews up to the outbreak of the war had regarded himself as a consistent Democrat with strong anti-slavery convictions but immediately upon the opening of hostilities he offered his services to Governor Dennison who forthwith appointed him lieutenant-colonel of the Twenty-third Ohio Volunteer Infantry of which W. S. Rosecrans was colonel and Rutherford B. Hayes major. Matthews served in the field with this regiment in Western Virginia during the summer and fall campaign of 1861, and in October of that year he was promoted to a full colonelcy and assigned to the Fifty-first Ohio Infantry. With this regiment he reported to General Buell at Louisville and served under him and his successors in the Army of the Cumberland in Kentucky and Tennessee. He for a time commanded a brigade and was recommended for a brigadiership but resigned before confirmation. He was for some time provost-marshal of Nashville and gave great satisfaction in the administration of the delicate duties of this office. While in the field he was elected a judge of the Superior Court of Cincinnati, and in April, 1863, resigned his commission as a soldier to return to civil life. His associates on the bench were Bellamy Storer and George Hoadly. He continued to be a member of this court a little more than two years but in that time he succeeded in proving himself a worthy fellow of the distinguished company

who have maintained the reputation of this tribunal at so high a standard.

In July, 1865, he resigned once more to enter upon the practice of his profession and almost immediately took a leading place at the bar of his state.

He had just passed the age of forty and was both physically and mentally just at that point of maturity when a lawyer's mind begins to expand into its fullest and broadest development. His two short terms upon the bench, his service as a prosecutor both for the state and the Federal government, his experience in both branches of the state Legislature, and his war service with its effective discipline, added to his early training as teacher and editor, had given him an unusual breadth of view and coupled with it of course was a reputation already extending beyond the lines of his state.

In 1864 and 1868 he served as presidential elector of the Republican party which had drafted him from the field of battle for service upon the bench and with Hayes, Schenck and other distinguished men of his state in the September, 1866, Unionist Convention at Philadelphia, he emphasized the dissatisfaction "of the men who had borne persecution for loyalty's sake, of the men who, having aided in achieving great victory, were resolved that it should not fail to bear its legitimate fruits," with the methods and policy of President Johnson. In 1864 he was a delegate from the presbytery of Cincinnati to the general assembly of the Presbyterian church held at Newark, New

Jersey, and reported the resolutions which were adopted by the assembly on the subject of slavery.

His career at the bar had begun at the time when the development of the railroads of the country was in its infancy and he may be said to have grown up with them. His varied experience, his reputation as a lawyer of solid attainments and broad mind naturally attracted to him those interested in these great enterprises and he soon became a leading railroad and corporation attorney and was engaged in almost every case of importance in his section of the country. He was associated as partner at various times subsequent to his retirement from the Superior Court bench with his brothers Samuel R. Matthews and C. Bentley Matthews, his son Mortimer Matthews and Mr. William M. Ramsey.

Matthews was one of counsel in a case that gained national fame for all that took part in it, the so-called Bible case tried in 1869 before the Superior Court of Cincinnati in General Term, Judges Bellamy Storer, M. B. Hagan and Alphonso Taft presiding. The Board of Education of the city of Cincinnati passed a resolution "that religious instruction, and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati, it being the true object and intent of this rule to allow the children of all sects and opinions, in matters of faith and worship, to enjoy alike the benefit of the Common School fund." Naturally this resolution aroused great feeling, and on the day

following its adoption an action was brought by a taxpayer praying for an order restraining the execution of the rule. Counsel for the plaintiffs were Rufus King, the historian of Ohio; George R. Sage, afterwards United States District Judge, and William M. Ramsey, and for the defense George Hoadly, J. B. Stallo and Stanley Matthews, all most distinguished members of the profession. Matthews' appearance for the defense in this case shows as no other act of his life can show more plainly the liberal character of the man as well as his high conception of a lawyer's duty. Judge Hoadly's comment upon the situation is of interest: "If it be possible for one who believes with all his mind the five points of Calvinistic theology, as Stanley Matthews did, at the same time to be what is called a liberal Christian, he was the man. When authorized by the School Board of Cincinnati, I telegraphed him at Washington, soliciting his coöperation in the effort to maintain the legal position the Board had taken, that the Bible should not be used as a book of worship in the common schools of that city, I knew what answer I would receive as well as when I received it; for I knew that his Christianity, ardent, devoted, springing from the full conviction of a man of high mental powers, was a Christianity which depended upon carrying others into assent and sympathy by the logic of its reasoning and the loveliness of its life, and not by the force of authority, or authority of force. He entered our case and Judge Stallo and I assigned

him the position of leader. How well he defended his opinions as a Christian, and at the same time proved that they would and could win the battle without the aid of legal authority, is recorded in the report which was made of the discussion on that occasion." This contest was indeed a battle of giants and the arguments of the six able lawyers who engaged in it at once pushed them into national prominence. But it is of especial value in the life of Matthews as reflecting particularly the moral strength of the man placed in a position rather different from that of his associates. What that position was is indicated in the opening words of his address:

It would cost me a very painful physical effort to appear to-day in any case, it has cost me a very difficult and painful mental effort to appear in this. It is easy to swim with the tide, to go with the current, to follow in the wake of the multitude. To do things that are popular is not hard. But to stand by a man's individual moral convictions, in opposition not to enemies, but to friends, tries a man. If your Honors please, it tries me. Except the loss of dear children this is the most painful experience of my life—to be told that I am an enemy of religion, that I am an opponent of the Bible, that I have lost in this community my Christian character, and that my children and grandchildren will reproach my memory for this day's work. For all that, and more, has not been whispered merely through the crowds, but has been told me to my face. If your Honors please, I would be silent to-day if I dared, but I have no choice.

Matthews' argument in the case stands among the best work of his life; it was the argument of a lawyer conscious of the greatness of the issue, the weight of

his responsibilities, the obligations of duty and the definite limitations of law. It was a lawyer's argument and not that of a publicist, although it was broad, liberal and replete with learning. Although the case was lost in the Superior Court, by a vote of two to one, Judge Taft dissenting in a very able opinion, upon final hearing in the Supreme Court of the state, the contention of Matthews and his associates was upheld, and the court laid down the law of the case to the effect that the discretion of the board could not be controlled by the courts.

Matthews was heartily in sympathy with the agitation which led to the Liberal Republican movement in 1872 and was temporary chairman of the Cincinnati Convention. In his address he insisted upon the continued loyalty of those participating in the movement, to the Republican party, but also insisted that "as the war has ended so ought military rule and military principles." The result of the convention however was a profound disappointment to him, always a little wary of the protective idea, and he "humorously and regretfully admitted that he was not a success at politics," and eventually returned to the ranks of his party. A current rumor of that time attributed to the effect of this speech of Matthews upon the mind of General Grant, the abandonment of a determination to select him for the vacancy resulting from the death of Chief-Justice Chase a year later.

Upon the nomination in 1876 of his lifelong friend

Mr. Hayes for the presidency, Matthews entered into the contest with the greatest vigor. He accepted the nomination for Congress from the second Ohio district and added great strength to the cause of his friend. His opponent was Henry B. Banning and the contest was a bitter one, marred by some unpleasant episodes, prominent among them being the revival of the story of the Connelly case of 1859. Upon the face of the returns he was defeated by a narrow margin of seventy-five votes. This majority he sincerely and confidently believed had been obtained by fraud and he served notice of contest upon his competitor. In the rush of important events that followed, this contest became of little importance and in the subsequent election of Matthews to the Senate, was lost sight of.

As soon as it became apparent that the election of President would turn upon the count of the votes in Louisiana and other southern states, a number of prominent members of the two great parties were designated to proceed to New Orleans to witness the canvass of the vote by the Returning Board. Stanley Matthews was one of the "visiting statesmen" selected by General Grant and with his associates he arrived in New Orleans on November 12th, 1876, staying there until the count was completed.

Upon the organization of the Electoral Commission, he was chosen with Messrs. Evarts and Stoughton of New York and Shellabarger of Ohio to present the claims of the Republican electors, being op-

posed by Messrs. Charles O'Connor, Jere. S. Black. Ashbel Green, R. L. Merrick and W. C. Whitney. He was chosen by his associates to open the discussion for his side which he did on February 3d, 1877, in a speech which although but an hour in length, laid down with clearness and precision the lines upon which rested the ultimate decision of all the cases. This argument Senator Edmunds, one of the Commission, said was "almost first among the foremost of the strictly legal and constitutional considerations that should have influenced, and, I think did influence the judgment of that tribunal." His associate Mr. Evarts said:

It was for Mr. Matthews to open that discussion. The subject of inquiry, as it appeared to the profession, to public men, to the popular mind, seemed dark, and it was in all respects novel. I need not say in this presence how profound was the immediate impression and how permanent the esteem of his argument in these debates. It preserved its predominant place on the side of which he was the champion until the close of the whole discussion.

Mr. Matthews' own sensations, expressed with the frankness natural in writing to his wife, follow:

It was of course a matter of great anxiety with me. It was an entirely novel and very imposing tribunal—the questions were great, and the interests vital and far-reaching and I feared lest I should fail to do myself and the cause that justice which public expectation was looking for and expected.—I felt that I had made a very creditable speech. The room was crowded, and every one gave very marked attention and it was a decided hit. One of the commissioners sent me a note from the bench complimenting me, and the speech has been very favorably received and commented on throughout the city.

After attending an evening reception where he received a "shower of compliments" he went to the printing office to correct the proofs. "I was very much disenchanted at reading it over, to see how flat, stale and unprofitable it seemed to be." A day later after hearing Mr. O'Connor and Mr. Evarts, he writes, "I am better satisfied with my speech on Saturday than I was before hearing them: as I feared I might suffer much by the contest. Mr. Evarts is an elegant, accomplished, scholarly speaker but he lacks point and force." He was much impressed however with both of these men "the two most distinguished lawyers in the United States."

On the day on which the judgment of the Commission in the Louisiana case was announced, February 17th, Mr. Matthews joined Mr. Charles Foster in a letter to Senator Gordon and Representative J. Young Brown which subsequently was the occasion of much discussion, in the course of which the success of Mr. Hayes was attributed to it. The purport of the letter was that the writers were confident that in the event of Hayes' election, he would permit the people of South Carolina and Louisiana to control their own affairs in their own way. The fact that the bill constituting the Electoral Commission was passed before Matthews came to Washington and that, at the time the letter was written, the decision in the Florida and Louisiana cases indicated the final result to the acceptance of which both parties were pledged, relieves this letter from the criticisms show-

ered upon it. If it did have the effect of inducing the unsuccessful party to abide by the result of the arbitration and thus saved the country from the horrors of civil war, it certainly should be regarded as one of the glories of Matthews' life.

On March 20th, 1877, Stanley Matthews was elected United States Senator from Ohio to fill the unexpired term of John Sherman who had become a member of President Hayes' Cabinet. Contrary to the usual experience of new members, he at once took a prominent part in the deliberations of the Senate. Early in December, 1877, he introduced the celebrated "Matthews Resolution" favoring the payment of the bonds in silver and the restoration of the silver dollar as legal tender. This action was practically the result of an instruction of the Legislature of his state which, by an almost unanimous vote, had passed a resolution demanding the restoration of the silver dollar as an act of "common honesty" and "true financial wisdom." The resolution which Mr. Blaine characterizes as a dissent on the part of Congress from the views of the President led to a protracted debate on the subject of finance in which thirty-four senators joined. It finally passed both houses and was followed by the so-called Bland Act of 1878. Mr. Matthews took a leading part in opposing the Chinese Immigration Act which was finally vetoed by the President. By reason of his long experience as a lawyer in connection with corporation and railroad affairs he was able to be of

great service in the committees having charge of such subjects, a fact that afterwards gave to his enemies an opportunity for impugning the sincerity of his service to the Government. Mr. Blaine says of his senatorial service: ⁴

Within the limit of two years, he made a profound impression upon his associates in the Senate. He proved an admirable debater, and seemed intuitively to catch the style of parliamentary discussion as distinguished from an argument in court. He left the Senate with an enlarged reputation, and with a valuable addition to his list of personal friends.

During the summer of 1878 he delivered before Justice Harlan at Newport, Rhode Island, one of the most important arguments of his professional career,—a masterpiece,—in the case of *Pittsburgh, Cincinnati and St. Louis Railroad Co. vs. Columbus, Chicago and Indiana Central Railroad Co.*⁵ This case, which involved many millions of dollars and many interesting questions of law, for a time completely absorbed him. His partner Mr. Ramsey tells us that his preparation was so exhaustive and exhausting that he seemed to have grown years older during this period and ever afterwards suffered from the effects of his excessive exertion.

Upon the retirement of Justice Swayne early in 1881, President Hayes sent the name of Stanley Matthews to the Senate to succeed him. That his confirmation was bitterly opposed particularly by many in the east is a matter of public history. He had

⁴ Twenty years in Congress, p. 599.

⁵ 8 Bissell's Reports, 456.

taken a most active part in one of the bitterest conflicts of modern politics and had been most conspicuous among the members of the bar as a representative of corporations and capital. To the objections that might have been urged as the result of mere differences of judgment were added as always happens in such cases the calumnies of personal enemies. Even a most unfair version of the old Connelly case of a quarter of a century before was made to do service. The opposition was sufficient to prevent confirmation during the few remaining weeks of President Hayes' term but promptly after the inauguration of Garfield he at Hayes' request sent the nomination once more to the senate. The opposition continued for some time but this extraordinary proof of confidence, the selection by two Presidents each from his own state and each familiar with his entire career, finally led to his confirmation on May 12th, 1881. He took his seat upon the bench of the Supreme Court on May 17th, and soon came to be recognized as one of its strongest members. Whatever opposition may have been manifested at the time of his nomination, was soon shown to be without foundation and those that led that opposition were glad to acknowledge their error. Principal among these was Senator Edmunds who later bore testimony that "the grounds upon which many senators (myself among others) thought it unfit that he should be called to this particular public service, turned out to be entirely mistaken, and in the public respects towards which our solici-

tudes were directed, his opinions delivered in this court and his assent to opinions upon that class of questions delivered by other judges, justified the President of the United States in insisting upon his appointment and convinced me, and I think no doubt all the other senators who were opposed to him at the time, that it was our mistake and not that of the President of the United States." Senator McDonald also a member of the senate committee to which the nomination was sent, took occasion to brand as false any insinuations as to his conduct during the crisis of 1876-7, at which time he, McDonald, was one of the "visiting statesmen" on behalf of the Democratic National Committee.

Justice Matthews served upon the bench of the Supreme Court for a little less than eight years. During that time he took part in many important decisions and delivered many most learned opinions on subjects of great importance and varied character. As to his judicial temperament, some of those who practiced before him are best qualified to speak. Senator Edmunds says of this phase of his character:

He showed himself to be among the best and most conspicuous examples, of that composition of mind, temperament and heart to make an almost ideal judge.—I think every gentleman who studies the opinions of the Supreme Court of the United States will be ready to say that his opinions are among those displaying a wealth of legal learning, clear statement, and fair and just logic. Without bias, without prejudice, with fairness of statement of the proposition against which he decides, with no obscurity in meeting the strongest aspect of the point that he overrules, his opinions,

I think, will be among the lasting and best of the memorials we have which are the daily and yearly contributions to the progress, welfare and justice of the government.

An interesting case⁶ was decided by him almost immediately after he took his seat upon the bench, in which he laid down the rule, that although the relation between a bank and its depositor is that of debtor and creditor, the money which he deposits if held by him in a fiduciary capacity, does not change its character by being placed to his credit in his bank account, and that therefore, if the bank has knowledge of this fiduciary capacity, it is not entitled to assert a banker's lien for debts owing to the bank against money to which the trust character referred to, attaches. In the same volume in a series of cases, he laid down the effect of statutes, giving the Postmaster-General the right to fix compensation for mail service upon contracts entered into by the United States with railroad companies prior to such statutes.

In the important cases of *Pritchard vs. Norton*,⁷ in a very clear opinion, he held that the validity of a bond as dependent upon the sufficiency of its consideration, is not a matter of procedure and remedy, to be governed by the law of the forum, but belongs to the substance of the contract and must be determined by the law of the seat of the obligation with a

⁶ *National Bank vs. Insurance Company*, 104 United States Reports, 54.

⁷ 106 United States Reports, 124.

view to which it is made, and the parties to a contract are presumed to have in contemplation a law according to which their contract would be upheld, rather than one by which it will be defeated.

Justice Matthews delivered the opinion of the majority of the court in the celebrated Virginia Coupon cases,⁸ in which it was held that the coupons of bonds issued by the state, are receivable as taxes due the state, and that any act of the state passed after issuing the coupons which forbade their receipt, was a violation of the contract and void. In the course of his opinion he says:

The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant [a city treasurer], to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character, and confessing a personal violation of the plaintiff's rights, for which he must personally answer.

These cases, eight in number, were in most instances decided by a divided court. Four of the justices dissented on the ground that the suits were virtually suits against the state of Virginia, to compel a specific performance by the state of an agreement to receive the coupons in payment of taxes and therefore repugnant to the eleventh amendment of the Constitution. The same matter of the Virginia cou-

⁸ 114 United States Reports, 269.

pons came before the court repeatedly in various phases and Justice Matthews was always the mouth-piece of the court in its utterances on the subject.

In the *Potomac Steamboat Company* case⁹ Justice Matthews in the majority opinion, discusses at length the question of riparian rights with relation to property granted as a street, holding that the United States as owner in fee of a street along the river bank is entitled to the exclusive right to build wharves along said street property.

In *Irwin vs. Williar*,¹⁰ he considers wagering contracts and particularly the subject of dealing in futures. In the *Hurtado* case in the same volume he held that the words "due process of law" in the Fourteenth Amendment does not necessarily require an indictment by the grand jury in a prosecution by a state for murder. In *Trust Company vs. Earle* in the same volume, he considers at length the doctrine of equitable assets, reviewing the English and American authorities on the subject.

In *Swift Company vs. United States*¹¹ he holds that a payment made to a public officer in discharge of a fee for taxes illegally executed, is not such a voluntary payment as will preclude its recovery.

In *Morgan vs. United States*¹² he held that government bonds and the obligation of the United States under them were governed by the law regu-

⁹ 109 United States Reports, 672.

¹⁰ 110 United States Reports, 499.

¹¹ 111 United States Reports, 22.

¹² 113 United States Reports, 476.

lating negotiable securities, modified only, if at all, by the laws authorizing their issue and that a statute of a state limiting negotiability of said bonds, could not change their character.

In the *Kentucky Railroad Tax* cases¹³ Justice Matthews considered the effect of statutes for raising revenue by collection of taxes and held that the procedure prescribed by a state which gives the party interested opportunity in a suit at law for the collection of the tax, to contest the validity of the proceeding, does not necessarily deprive him of his property without "due process of law" and that such state law which provides for an impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, denies to no person affected by it, equal protection of the laws.

In *Yick Wo vs. Hopkins*¹⁴ he held that in a case where the constitutionality of an ordinance made by a municipal corporation is involved, the Supreme Court of the United States will put its own construction upon the ordinance, and that the guarantees of protection contained in the Fourteenth Amendment extend to all persons within the territorial jurisdiction of the United States, without regard to differences of race, of color or of nationality, and that such guarantees extend to those subjects of China, who

¹³ 115 United States Reports, 321.

¹⁴ 118 United States Reports, 356.

have the right temporarily or permanently to reside in the United States.

In the Louisiana Lottery case, he held that a grant in the constitution of a state of privileges to a corporation, is not subject to repeal or change by the Legislature of the state and that an assessment of tax upon the stockholders' shares, which the company must pay irrespective of dividends or profits from which it might repay itself, is a tax on the corporation itself. ✓

In *Livestock Company vs. Slaughter House Company*,¹⁵ the law of malicious prosecution as applied in Louisiana, was laid down, and it was further held that the judgments of the United States court sitting in any particular state, are to be accorded in the courts of that state such effect only that would be accorded to the judgments of a state tribunal of equal authority.

In *Metropolitan Railroad Company vs. Moore*¹⁶ he held that when Congress adopts a state's system of jurisdiction and incorporates it into the federal legislation for the District of Columbia, it must be presumed to have adopted it as understood in the state of its origin, and not as it might be affected by previous rules of law, either prevailing in Maryland, or recognized in the court of the District.

A very important case decided by Justice Matthews was *in re Ayres*,¹⁷ in which it was held that

¹⁵ 120 United States Reports, 141.

¹⁶ 121 United States Reports, 558.

¹⁷ 123 United States Reports, 443.

whether a state was an actual party defendant in a suit was to be determined by consideration of the nature of the case as presented by the whole record and not in each case by reference to the nominal parties of the record and that a bill in equity brought against officers of the state as nominal defendants having no personal interest in the subject matter where the relief prayed for, is a decree that the defendants may be ordered to do and perform certain acts, which when done, will constitute a performance of an alleged contract of the state, is a suit against the state.

A celebrated case decided by Justice Matthews is that of *Bowman vs. Railway Company*.¹⁸ This case held that a state cannot for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other states of the Union unless the consent of Congress, express or implied, is first obtained, and that a law of the state of Iowa forbidding common carriers to bring intoxicating liquors into the state under certain conditions adopted without the purpose of affecting interstate commerce but as a part of the general system to protect the health and morals of the people is a regulation of commerce among states and repugnant to the Constitution.

Justice Matthews rendered many opinions of great value in patent cases, a branch of the laws for which his orderly habit of thought admirably fitted him.

¹⁸ 125 United States Reports, 465.

Naturally his long experience as an attorney in railroad and corporation cases gave to his many opinions on such subjects unusual value and weight.

In the fall of 1888 Justice Matthews' health, sorely tried by many years of persistent and exacting labor, finally became such as to require his confinement to his residence. He died on March 22d, 1889.

Shortly after his accession to the bench his first wife had died, and a few years before his death he had married Mrs. Theaker of Washington, who survived him. Five children of his first marriage also survived him, two sons, Mortimer and Paul, and three daughters: Grace, the wife of the late Harlan Cleveland of the Cincinnati bar; Jean, wife of Mr. Justice Gray, and Eva. In the week following his death he was interred in Spring Grove Cemetery within a few miles of the beautiful Glendale home which had been in his possession for more than a third of a century. The many memorial meetings held not only at Washington, but in the city of his birth, and in many other of the cities of the Sixth Circuit of which he was the presiding justice, testified to the strong affection and sincere respect in which he was held by the public and the bar.

THOMAS McINTYRE COOLEY.

THOMAS McINTYRE COOLEY

From a photograph by Randall.



THOMAS McINTYRE COOLEY.

1824-1898.

BY

HARRY BURNS HUTCHINS,

Dean of the Law School of Michigan University.

THOMAS McINTYRE COOLEY was born January 6th, 1824, in Attica, New York, and died at his home in Ann Arbor, Michigan, September 12th, 1898. He came of New England stock, his earliest paternal ancestor of whom we have any knowledge being Benjamin Cooley, a man of some local prominence in Massachusetts during colonial times. According to the family history, early in the last century, four Cooley brothers, one of whom was Thomas, the father of the subject of this paper, removed from Massachusetts to become pioneers in what was then the wilds of western New York. Settling near what is now the village of Attica, they became substantial farmers and men of considerable influence in the neighborhood, though none of them, so far as can be learned, ever held office or aspired to leadership in local affairs. Thomas McIntyre was the tenth in a family of fifteen children. Simply to provide the necessities of life for such a family was no easy task for the pioneer farmer, and it is not a matter of surprise that he was able to furnish to his

children only limited opportunities for education. As a boy, the future jurist labored upon his father's farm, and up to the age of fifteen years had only the educational advantages afforded by the district school of the neighborhood. These were meager in the extreme, but he seized upon them with that eagerness for learning that characterized his entire life. He acquired with great ease and rapidity, and even during his district school days was looked upon as wise beyond his years. It was in his case as in many others, the foundation of his learning rested in the habit, early formed, of continuous and discriminating reading. While yet a youth, he had become familiar with much that is best in our literature. His love of historical reading and study developed early. It is the tradition that as a boy his evenings were spent at home where, by the light of the open fire, he would absorb such standard historical authors as good fortune might throw in his way. At fifteen young Cooley was a pupil in a school of the neighboring village, called Attica Academy. This he attended with more or less regularity for three years, maintaining himself very largely and perhaps entirely through his own efforts. The summer found him at his work on the farm, and it is known that he helped himself by teaching district school for several terms. While in the Attica Academy, he studied the subjects ordinarily pursued in such a school, giving particular attention to Latin, algebra and geometry.

Even as a youth, Judge Cooley had apparently de-

terminated upon a plan of life. It was his early purpose to become a lawyer and to fit himself for his life work by a thorough preliminary training. His hopes for a college education were confided to his mother. She seems to have understood the boy, as the father apparently did not, and in her the son found a sympathetic adviser. She was a woman of more than ordinary parts, and although not educated herself, appreciated fully the advantages that a college training may give. As is not infrequently the case with those who are unfamiliar with that training, she may have exaggerated its importance. She could not know that this son had in him the stuff that would supply deficiencies and make opportunities; hence her anxiety that the best in the way of education should be his and her encouragement that his ambition might be realized. The disappointment of both was keen when they met with unyielding opposition in the father, based to some extent doubtless upon his inability to furnish the necessary funds, but largely upon his lack of sympathy with the ambition of his son. The father was an upright man in all his dealings, respected as a citizen and neighbor, but his horizon was a narrow one, and his mind had doubtless been cramped and warped by the hard experiences of a pioneer life. At all events, the ambitious plan of his son was to him not only an impossible one but in every way undesirable. The father was a farmer and the son should be a farmer. This was the decision, and argument became useless.

The outlook for the youth was certainly not encouraging. It would have disheartened an ordinary spirit. But this boy had red blood in him and an indomitable will. He could not be conquered by poverty, neither could the father's opposition crush him. He was alive to the fact and understood its full significance, that if he was to take a place in the world, he must make it for himself. To a man of natural parts, a realization that his future depends upon his own exertion, becomes a spur to action that is always pushing him forward to new achievement. Judge Cooley in his mature years often expressed regret that he did not have a thorough preparatory training and early social advantages, yet a deficiency in these respects was never apparent in him as a man. As one of his colleagues in the Law Faculty of the University of Michigan has said:

Somehow Judge Cooley attained a better education than nine-tenths of the college graduates. He learned from reading and the great school of life, where most of us get the discipline which is most useful. And it may be that this was the best school for him.

The training of the schools is, without doubt, harmful to some natures, as it stimulates in them feelings of self-consciousness, distrust and self-depreciation, always fatal to the highest success. One cannot, for example, read the story of Lincoln's life without being impressed with the notion that any other education than that which he had, might have dwarfed his rugged strength. And it is quite possible that

through the disciplinary and refining processes of formal education, there would, in Judge Cooley's case, have been a loss of that independence in thought and judgment and action, and of the constructive power that so conspicuously characterized his mature life. It may have been fortunate for him and for the world that necessity made Judge Cooley his own instructor.

It is apparent that even before he left the Attica Academy, young Cooley realized that the most valuable part of an education consists in the continued use and development of one's powers by independent thought and action. For he was not content with accomplishing simply the assigned tasks, but was continually doing things that required initiative, and the exercise of independent thinking. He was active in the literary exercises of the school, appearing upon several public occasions. He began to have definite ideas upon some of the public questions of the day, and occasionally articles from his pen appeared in the local press. Indeed, it is said that "he wrote passable verses, some of which were published in the *Attica Democrat*." But it was as a writer of prose that he excelled, even as a youth, and no small part of his success in life was due to his ability, constantly exercised, to express his ideas in compact, clear and forceful English. Nature gave to Judge Cooley the power to think clearly, and thinking clearly, he wrote clearly. No one could ever be in doubt as to his meaning.

Abandoning with keen regret his hopes for a better preparatory training, young Cooley began the study of law in the summer of 1842 in the office of Theron K. Strong, at Palmyra, New York. His preceptor was afterwards a judge of the Supreme Court of the state, but at this time he was a practitioner of standing and influence, busily engaged with the demands of his numerous clients. From him the young student could expect little aid other than directions in regard to clerical work in the office and occasional suggestions as to the order of his reading. But in his preceptor the young man had before him what certainly was of great value, an example of professional industry and masterfulness; for Judge Strong was a practitioner who believed in the genius of hard work and who devoted to the large interests committed to his guidance the best efforts of which he was capable. Few of the details of this apprenticeship have come down to us, but it is not improbable that the great energy and ceaseless industry which became the prominent characteristic of the future jurist, were aroused in no uncertain way by this early influence. Why it was that young Cooley suddenly, in 1843, started for the west, does not distinctly appear. It has been stated, though perhaps without sufficient authority, that the opposition of the father to the son's plan for a professional career, was really the influence that prompted the change. Doubtless the opportunities that a new and undeveloped country would afford, had much to do with it. Although he is said to have

had in mind Chicago as an objective point, the young man stopped in Adrian, Michigan, apparently for no other reason than that his means for further travel had become exhausted. Here he at once resumed his law studies in the office of Tiffany and Beaman, where he remained until he was admitted to the bar in January, 1846. In order to support himself during this apprenticeship, he did any kind of work that offered, whether professional or not. He copied records for the county, and for a time discharged the duties of deputy county clerk. It is the tradition that he identified himself with the interests of the village and was popular with his fellow townsmen. An extract from a local paper of the time shows that he was a member of a village military organization, known as the Adrian Guards, whose muskets and cross-belts were said to have been brought over from France by Lafayette.

On the thirtieth day of December, 1846, the year of his admission to the bar, Judge Cooley was married to Mary Elizabeth Horton. He was then twenty-two years of age and she was sixteen. The union proved a most fortunate one. Mrs. Cooley was the ideal wife, a helpmate in every sense of the word. She appreciated the work of her husband and was a constant source of encouragement to him. A devoted mother, she yet found the time to meet and discharge in a most gracious way her many social obligations and public duties. Her death in 1890 was a stunning blow to the husband and family, and made

desolate what had always been an exceptionally happy home.

For at least ten years after his admission to the bar, the success of this young lawyer was only moderate, perhaps hardly that. He was not in a location that furnished extensive or important litigation. The country was new and undeveloped. The middle west was not then as now the field of vast commercial and industrial enterprises that demand the guidance of legal talent of a high order, and that bring to the lawyer of ability and industry opportunities for extended professional reputation and substantial professional returns. The cases before the courts, while often difficult and of great local importance because settling questions of law in the new jurisdiction that had therefore been unsettled, usually involved small amounts and yielded correspondingly small returns to the lawyer. Not only were the business conditions unfavorable, but I doubt if our young practitioner was specially adapted for getting business. He was modest, retiring, the opposite of assertive, inclined to distrust his own ability, and he had to be thoroughly known to be appreciated. It is probable that, as a youth, his presence and manner were not of a character to inspire the confidence of litigants. If he once got a client, he held him, for he did his work thoroughly well and never failed to show that he could manage in a satisfactory manner any business committed to his care. His was the case of a man winning his way slowly, step by step, solely through

the merit of the work given him to do. No one knowing Judge Cooley could ever think of him as other than the student lawyer, holding rigidly to the highest standard of professional ethics. To attract business in any other way than by devoting to his work the best that was in him, or to push himself professionally, would have been regarded by him as beneath the dignity of his calling. And yet he felt that he should in some way make for himself greater opportunities. It is apparent that he was not contented with his slow progress. His ambition during the first years of his work was far from being satisfied. He was undeniably restless, as his frequent changes in location plainly indicate. Soon after his admission to the bar, he removed to Tecumseh, Michigan, where he formed a partnership with Consider A. Stacy, a practitioner of state reputation. But in 1848 we find him again in Adrian, this time as a member of the firm of Beaman, Beecher and Cooley. He remained in Adrian continuously until 1854, and although a member of this firm during all that time and undoubtedly giving his predominant energies to the law, he had other interests. He was elected to the office of Circuit Court Commissioner of the county, a *quasi*-judicial position, in 1850, and during the same year he was made Recorder of the village. His duties in these humble offices were performed with a painstaking care and diligence that commended him to all with whom he came in contact officially. He was also at this time the editor of a

weekly newspaper, the Adrian Watch-Tower, secretary of the Lewanee County Agricultural Society, and as a side issue an agriculturist, for in connection with his father-in-law he gave some attention to the cultivation of a farm.

But these activities did not satisfy. The opportunity that this young man sought was not as yet forthcoming. Toledo, Ohio, seemed to him a desirable field, and in 1854 he became a member of the Toledo bar. Soon after opening his law office, he joined with a friend in the real estate business, and their ventures seem to have been successful. Judge Cooley always, whenever the occasion arose for him to exercise it, showed what is very rare in men of scholarly tastes and habits, remarkable business ability. His judgment of men, of values, of business conditions and of what should be done to meet business emergencies, whenever he had occasion to exercise it, as he frequently did in later life, was invariably correct. It is an opinion not infrequently expressed by those who knew him most intimately that if he had not been a great jurist he probably would have been a great financier. But while engaged in the real estate business in Toledo, his chief energies were given to the law. That he had attracted public attention to his legal ability, is apparent from the fact that he was selected by the Democrats as their candidate for Judge of the Court of Common Pleas. He was not elected, however, and his defeat may have had something to do with his determination to return

to Michigan. At all events, for some reason he had become satisfied that for him Michigan was the better field, and we soon find him again in Adrian, where he formed a partnership with the late Governor Croswell. One of his biographers says:¹

This partnership seemed satisfactory. Croswell kept the office and Cooley did the work in the courts. He tried all kinds of cases in justice courts and in the circuit, . . . gained a high local reputation at the bar of the county, but had no state fame. He was known as a most intense and rapid worker. He would work for very little rather than not work. He took every kind of legal business which came, and he also had a reputation for literary cultivation.

In 1857 Judge Cooley was in his thirty-fourth year. He was still a country practitioner, and while becoming fairly well known in southern Michigan, he cannot be said to have gained an extended reputation as a lawyer. Up to this time his name appears but once in the Supreme Court reports of the state. But he was soon to be accorded recognition, and this was to come quite as much through his ability to write clear, accurate and forcible English, as through his abilities as a lawyer. In 1857 two statutes were passed by the Legislature of Michigan that were to have a distinct influence in the life of this young man. They gave to him opportunities for which he had been waiting and fitting himself. The one provided for a compilation of the laws of the state and the other for the independent Supreme Court of the state. The

¹ Memorial address of Hon. Charles A. Kent, 1899.

Legislature appointed him compiler of the laws. Doubtless political influence had something to do with his appointment, for Judge Cooley was acting with the dominant party, and was always considerable of a politician, though never an extreme partisan. But it was urged that he was well-fitted for the duties of the office on account of his literary ability and his capacity for accurate and rapid work. The execution of this commission proved that the claims of his friends were well-founded. It was done within the short time fixed by law, nine months, and in such a way as to meet with general commendation and to give to the young compiler a state reputation. The work involved great labor, great accuracy and great discrimination. The logical mind is apparent in the arrangement which has been the model for every subsequent compilation. The entire work bears the stamp of the accomplished lawyer and the man of correct literary taste and judgment.

The successful completion of this work meant much to the compiler. The accurate and comprehensive knowledge of the statute law of the state thereby required, was to be of great assistance to him in his subsequent career as lawyer, judge and jurist. But its immediate service lay in the fact that it brought his name prominently and favorably before the profession of the state and particularly before the judges of the court of last resort. When, therefore, in 1858, Mr. Cooley was appointed by this court the reporter of its decisions, the selection was gen-

erally recognized by the profession as most fitting. It was very soon apparent that the court had found the ideal reporter. The work was to Mr. Cooley's taste, and he brought to it not only the never-flagging energy that characterized his entire active life, but powers of analysis and discrimination that are rarely found in the court reporter. He had, also, what the court reporter too often lacks, the ability to write with terseness and accuracy. His syllabi are models of comprehensiveness, compactness and lucidity. In reading them, one is never in doubt as to what the reporter thinks the court has decided, and one soon finds that a verification of the reporter's conclusions is not necessary. It is not a matter of surprise to find that the volumes, eight in number, issued by Mr. Cooley, appeared promptly and that they stand as excellent examples of court reporting.

It was probably fortunate for Judge Cooley and the profession, as well as for the cause of sound legal learning, that he had not, at the time the office of compiler of the laws was tendered to him and later that of court reporter, a standing at the bar that met his expectations, for with a large and increasing practice to absorb his attention and satisfy his ambition, he doubtless would have declined the appointments that opened the way to a career for which, both by natural endowments and self-training, he was peculiarly fitted. These appointments gave him opportunities as a lawyer that he had not theretofore enjoyed, and it is well known by the older mem-

bers of the profession that thereafter, until he went upon the bench, Mr. Cooley was recognized by both bench and bar as one of the able practitioners of the state, particularly before the court of last resort. Referring to this period of Judge Cooley's life, an associate upon the bench has said:²

His legal ability now began to be generally recognized, and his practice greatly increased, especially in the Supreme Court; and it is a flattering evidence of his popularity that, from the time he was appointed reporter to the time he was elected to the Supreme Bench, covering a period of seven years, he had argued in that court over forty cases, which number, it is estimated, equalled, if it did not exceed, that of any other practitioner at that time.

Yet Judge Cooley is not remembered as a practitioner of prominence. And it is quite certain that he was never such in the *nisi prius* courts. Furthermore, it is probable that he never could have become prominent there, for he lacked the aggressive qualities that count for so much in courts of first instance. But he was well fitted by temperament and training for effective work before an appellate tribunal, and there were few lawyers in the state at the time who were Mr. Cooley's superior in this field, or who appeared more frequently than he in contests before the Supreme Court of the state. Doubtless if he had remained at the bar, his marked ability in this direction would have received extended recognition. It is known that in his later years, Judge Cooley expressed the opinion that remaining at the

² "In Memoriam," Thomas M. Cooley, 119 Michigan Reports, vol. LVII.

bar would have been for him a wiser course than the one that he followed. In this he was undoubtedly in error. He made for himself a name and a place in our jurisprudence that entitle him to be ranked with the most distinguished jurists of his time, but he evidently never thoroughly realized the extent of his influence or the lasting character of his work. His nearest friends know that he was inclined to underrate the value of what he did and his fitness for the scholarly career to which he devoted so much of his active life. But even though all the success that his great abilities might have brought to him as a lawyer, had been his, it is doubtful if, without distinct achievements in other fields, his fame and influence would have been more than local or his name a familiar one beyond his own generation. For the work of the lawyer, though he be distinguished, is soon forgotten. The record of it is not, as a rule, so made that it reaches the ordinary reader, and if it were, the extent and the real value of it would not usually be appreciated. Although engaged in causes of national importance that through the aid of his learning and skill have resulted in the judicial declaration of principles that affect the most vital interests of the citizen, the lawyer, with few exceptions, can expect little appreciative recognition outside of his own profession, and even there, excepting in rare instances, from only a small part of it, and for a limited period. How many members of the profession, to say nothing of laymen,

can to-day even name the respective counsel in a limited number of the great cases that have become historic because of the interpretation therein of some part of the national Constitution? And yet at the time of the argument of such causes, the counsel engaged were in the front rank of the profession and doubtless contributed much that influenced the judgments. The truth is that ordinarily the work of the lawyer is merged in the decision of the court, whose judgments alone, as a rule, go to make up the bulk of our judicial history. And, therefore, we may fairly conclude that it was probably very fortunate for Judge Cooley and for jurisprudence that circumstances confined his labors so largely to the scholarly side of the law.

In 1859 the Department of Law of the University of Michigan was established, and Mr. Cooley, then the reporter of the Supreme Court, was one of the three professors elected by the Board of Regents to constitute the first faculty. In view of his marked success in compiling the laws of the state, of the excellence of his work as reporter, and of his growing reputation as a profound lawyer of the scholarly type, this selection was a natural one and, it is needless to say, proved to be most fortunate. His associates upon the faculty, Judge James V. Campbell and Mr. Charles I. Walker, were men of established reputation in the profession. The former was then and for many years thereafter a distinguished member of the Supreme Bench of the state, while the

latter was at the time a practitioner of marked ability and large experience. Systematic legal education through the instrumentality of the law school was then in its infancy. The profession generally had little sympathy with any method of training for the bar excepting the historic one of apprenticeship in the law office. It was thought to be illogical and impracticable to study the law as a science excepting in connection with its study and application as an art. There were few law schools in the country and none of standing and influence in the west. But little attention had then been given to methods in legal instruction, that was to be a later development, and in all of the schools the work was done by men whose predominant energies were devoted to duties upon the bench or at the bar. It goes without saying that a school conducted under such conditions must have a teaching force made up of men of exceptional ability and with special aptitude for instruction, if it is to make a place for itself and gain the confidence and support of the profession. It was fortunate for this newly-established department, as well as for the cause of legal education generally, that all of the men upon its first faculty were not only profound lawyers but also teachers of exceptional power, and that their valuable services were retained for many years. The department was successful from the first, and could not well have been otherwise with such men as instructors. Each brought to his work not only great learning but also

the force of a distinct personality which made a lasting impression upon the student.³

The memory of that first faculty, their skill as teachers, as well as the reputations which its members made on the bench and at the bar, and the widespread and commanding influence of Judge Cooley's books upon the growth and development of the law during the last thirty years, have been, and still are, potent forces in turning the footsteps of the youth of every state . . . toward those halls where Judge Cooley and his associates labored so faithfully and well.

Upon accepting the law professorship, Mr. Cooley removed to Ann Arbor, the seat of the State University, and that city continued to be his residence during the remainder of his life. He identified himself at once with the interests of the University and the city, and although devoting much time and great energy to his duties as professor, he also retained his office as reporter. He was continuously in the service of the Department of Law for twenty-five years, and during twenty years of that time, he also served upon the Supreme Bench of the state. With the exception of a single year, he was uninterruptedly on the teaching staff of the University from the time of his appointment as professor in the Department of Law until his death, a period of nearly forty years.

Judge Cooley was undoubtedly a great teacher. He had the teaching power to a remarkable degree. He was a thorough master of his subjects and al-

³ From the Memorial Record of the University Senate upon the death of Judge Cooley.

ways gave to his students the best of which he was capable. Although not an orator in the popular sense, he at once challenged and held the attention of his large classes by the absolute clearness and simplicity of his exposition. In slow and measured utterances, his enunciation perfectly distinct, his English a model of lucidity, he would so unfold the subject that inattention was impossible. The thin voice was forgotten and personal peculiarities were unnoticed. His hearers were dominated solely by the intellectual power of the man. No student ever left Judge Cooley's lecture room without feeling that he had listened to a great expounder of the law, and no student who came under his instruction and influence ever left the University without being conscious of a debt of gratitude to this great teacher. When we remember the thousands who, during his long term of service sat under his instruction and the places of importance and influence that many of them have held and are now holding, not only at the bar but also upon the bench and in legislative and executive fields, we can realize in some degrees the extent of the indirect influence of Judge Cooley upon the legal thought and life of our times. But his contact with the students was not confined to the class-room. During almost the entire period of his service in the Department of Law, he was the only resident professor, and during practically all of that period he was its Dean. He was thus brought more directly in contact with the life of the students than were his

associates, and in this way became to a very large degree the molding force in the Department. "The largest share of the success of the school," says one of his associates upon the Faculty, "must be attributed to him."⁴

To one of scholarly temperament, a university connection offers much that is attractive and affords opportunities that one can rarely command if absorbed in active professional or business life. At the University, Judge Cooley found, not only most congenial society, but also an environment that undoubtedly stimulated his natural taste for literary work. Although he continued to give his chief energies to the law, his studies in the allied fields of history and political science were such as to bring to him distinguished recognition. From boyhood his interest in American history had been intense, but he now devoted to the subject extended and systematic study. His attainments in the historical field were such that in 1885, after his retirement from the Department of Law and from the Supreme Bench, he was elected Professor of History and Dean of the School of Political Science in the Literary Department of the University. Previous to that time he had for several years given courses in the School of Political Science, in which from 1881 to 1884 he held the professorship of Constitutional and Administrative Law. In 1886 he was made Professor of American History and Constitutional Law and Dean of the School of

⁴ Memorial address of Hon. Charles A. Kent, 1899.

Political Science. But the public demands upon his time were such that in 1887 he was obliged to discontinue regular work in the University, though he thereafter gave occasional brief courses upon legal and historical subjects, as long as his health would permit. Judge Cooley's fame as a lecturer upon legal and allied subjects was by no means confined to his own university. His services were frequently sought by the leading universities of the country, but his engagements were such that he was obliged to decline the invitations excepting in two instances. For three successive years he lectured in Johns Hopkins University upon Constitutional Law and Municipal Government, and he also delivered a series of lectures on the Interstate Commerce Law before the law students of Yale University.

All that has been said of Judge Cooley's power and effectiveness as a lecturer upon legal subjects, may be said of him in the fields of American history and political science. Though not probably a scientific student of historical sources according to the modern standard, he had read widely and appreciatively, and was thoroughly familiar with the development of the political institutions of England and America. He had the historical sense in a marked degree. While his sympathies were always with those struggling for individual and political liberty, he brought to bear upon historical questions the discriminating and impartial judgment of the trained jurist. His lectures upon American history

were inspiring and suggestive, judicially fair, but at the same time patriotic in spirit. "With no disposition to boast, he taught his hearers pride in our history and admiration for the great men who guided the colonies and the nation in their formative periods."⁵

Judge Cooley cannot, of course, be classed as a historian; he was first and essentially a jurist, and only incidentally a historian. Yet the reader of his only published historical work, a history of Michigan, appearing in 1885 as one of the American Commonwealths Series, must recognize in the book a historical production of more than ordinary merit. He finds in it not only an intensely interesting account of the striking events in the successive dominion of France, Great Britain and the United States over the Northwest Territory, and of the development first of the territory and then of the state of Michigan, but also what is in reality a brief but comprehensive history of governments in America. This is supplemented by a thoughtful consideration of the relations of the states to the Union at the time Michigan took her place as a state and some of the remarkable changes that since that time have seriously influenced constitutional and political questions. The book as a whole commends itself at once as the production of a scholarly and masterful mind.

Isolated quotations as a rule give but an inadequate idea of an author's style and method, yet some notion

⁵ Memorial address of Hon. Charles A. Kent, 1899.

of the clearness and effectiveness of statement that characterize this book may be gathered from the following: ⁶

With the triumph of Wolfe on the heights of Abraham, it has been said, began the history of the United States. Voltaire, in his retirement at Ferney, rejoiced at the fall of Quebec, and the immediate surrender of Canada, and celebrated it by a banquet as the precursor of American enfranchisement. But this great event meant more than American enfranchisement; it meant the overthrow of the despotic principle in America, and the surrender of the continent, with all its immense possibilities, to the growing and expanding ideas of English liberty. American enfranchisement from British rule was an event of first importance, but its value to the world would have been infinitely lessened had it not been grounded on the assertion and maintenance of rights assured to the subject by English law. For many centuries now the germs of free institutions had been planted in England, nurtured by the robust thought and defended by the vigorous arms of its people; and when from time to time despotism trampled in the dust the incipient attempts of other nations to win recognition of rights or to gain relief from intolerable burdens, the sea-girt island, in maintaining her independence, preserved her liberties also, and the slow but certain development of free institutions went on unchecked. The two opposing principles in government had now grappled in a final struggle for mastery in America, and when despotism fell, a Britain, no longer needing the protection of the four seas, but stepping boldly out to occupy a continent as master, began immediately to give prophecy of that vast confederacy of commonwealths which was successively to become the rebellious child, the hated rival, and at last the chief glory of the island parent, and the precursor of other confederacies of commonwealths which should speedily give the English tongue and to English liberty an undisputed leadership on both continents.

⁶ Michigan: American Commonwealths, pp. 44-46, 127, 129, 130.

In speaking of the adoption of the Ordinance of 1787, the author says:

This was the immortal Ordinance of 1787 "for the government of the Territory Northwest of the Ohio;" immortal for the grand results which have followed from its adoption, not less than for the wisdom and far-seeing statesmanship that conceived and gave form to its provisions. No charter of government in the history of any people has so completely withstood the tests of time and experience: it had not a temporary adaptation to a particular emergency, but its principles were for all time, and worthy of acceptance under all circumstances. It has been the fitting model for all subsequent territorial government in America.

And after reviewing the significant articles of the Ordinance, he continues:

In all this Ordinance, so full and complete in its provisions for government and for the protection of individual rights, framed though it was when popular notions of government were crude and unsettled, not a provision appears—if we except the proviso to the sixth article, which concerned external relations—which after the lapse of a century does not still appear wise and proper; not a line which one could wish had been omitted; not a clause which one could desire modified in any important particular. For its dedication of the territory to freedom, credit has been given by partial friends to several different persons; but Jefferson first formulated the purpose, and for him it constitutes a claim to immortality superior to the presidency itself. The one was proof of his greatness and far-seeing statesmanship; the bestowment of the other evidenced only the popular favor. The Ordinance was the beginning of the end of American slavery. It checked at the banks of the Ohio the advance of a system fruitful of countless evils, social and political; and the opponents of the system found in its mandate of uncompromising prohibition an inspiration and a prophecy of final triumph in their subsequent warfare.

In November, 1864, Mr. Cooley was elected to fill a vacancy upon the Supreme Bench of the State, caused by the death of Mr. Justice Manning. The nomination came to him unsolicited, as did every summons to official station during his entire life, and his election followed as a matter of course. His efficient services as reporter, his recognized standing as a painstaking and scholarly lawyer of judicial temperament, and his reputation as an accurate and rapid worker commended him at once to the profession as a man eminently qualified for the place. As one of his associates upon the Supreme Bench has said, he "was chosen as if by a sort of natural selection to fill the block in our judicial temple torn from its place by the death of Justice Manning." Judge Cooley continued to be a member of the court until his resignation, in 1885, and in discharging the functions of his high office he rendered to the state and to jurisprudence most distinguished service. A place upon a state court of last resort is one of prime importance, and demands ability and preparation of a high order, yet it is not one that under ordinary circumstances attracts public attention or brings more than local recognition even in the profession. The people generally know that they have a court of final appeal, but the majority of them utterly fail to appreciate its influence as a restraining and molding force in the state. While a court may be regarded by the best informed in the profession as exceptionally able, or some member thereof may

be known to them as the writer of learned and exhaustive opinions, neither the court nor the individual judge receives the general public recognition that is accorded to one who has successfully exercised public functions in the executive or legislative fields or to one who has ably treated public questions in the field of authorship. The reason is not far to seek. The courts of this order are numerous, their decisions are bewilderingly so, and the questions considered in the majority of cases are not such as to challenge public attention. The immediate bearing of a decision is upon private rights and interests, and although it may be of special significance and importance to the people as settling some general principle of law within the jurisdiction, it fails to attract public attention because its public bearing is not appreciated. And so it happens that while the judges of a court of last resort are declaring the law under which the people are to live and by which their rights, interests and liabilities are to be determined, the great work of these public servants is little understood by the general public and by such work alone one rarely acquires fame or general recognition even in the profession. The Supreme Court of Michigan during the time that Judge Cooley was a member of it, was undoubtedly one of the ablest of the state courts. Its judges were not only men of great learning and great industry, but they were men of large experience in the affairs of life. They had, moreover, the judicial temperament in a marked degree.

Their opinions, as a rule, were scholarly and exhaustive discussions of the principles involved, and in the most of them we find not simply the decision of the individual case but a positive contribution to jurisprudence. It was indeed fortunate for the state that at a time when there were so many unsettled questions to be determined by its court of last resort, the men upon the bench were of the masterful and constructive type. But while the opinions of the court at this time undoubtedly influenced to a very considerable extent the law of other jurisdictions, particularly in the west, where they were freely cited and followed, its reputation in the country generally was probably due very largely to the fact that Judge Cooley was upon the bench. Not that he was more able as a judge than were his associates, for he was not; they were all men of exceptional judicial capacity; but the attention of the profession generally the country over had been challenged by Judge Cooley's great work upon constitutional subjects, and that attention was naturally directed to the court of which he was a member. If, like his associates, he had confined his energies entirely to judicial duties, it is probable that his name would not have been better known than theirs and that the court would not have had the high national reputation that it enjoyed during the period that he was upon the bench.

But it is not intended by the writer to convey the impression that because Judge Cooley did not, in

his opinions, display greater judicial ability than his associates upon the bench, he was not, therefore, a great judge. He was a great judge, as were his associates. He was a great judge but with only the opportunities afforded by a state tribunal. Whatever he did in this field, he did thoroughly well. But his chief title to distinction lay in his ability as an expounder of constitutional questions, and this he exercised as an author more largely than as a judge. Could he have had the opportunities that Marshall had, such was his grasp upon fundamental principles and such his ability for logical, forceful and exact statement that he would undoubtedly have been the equal of Marshall upon the bench. It is, however, with Judge Cooley as he was upon the bench and not as he might have been, that we have to deal. And it is no exaggeration to say that he was the ideal judge. He combined in a rare way the qualities that go to make up the judicial temperament. No one who appeared before him could forget the careful and painstaking attention with which he followed the argument of counsel. He was pre-eminently a good listener, and one always felt that his occasional questions were a positive aid in the development of the subject under discussion. He moreover always gave the impression that he was bringing to the consideration of the case his best thought and best judgment. No one ever detected in him the slightest tinge of prejudice. He always preserved the judicial attitude. He was kindness it-

self upon the bench, particularly to the young practitioner, although always dignified and scrupulously just.

"I have a keen recollection," said one of the distinguished members of the bar upon the occasion of the memorial exercises in the Supreme Court,⁷ "of the encouragement which, as a young practitioner, I received from Judge Cooley's careful attention and evident sympathy during the earlier arguments I made before this tribunal." And upon the same occasion another said: "I would not if I could, and I could not if I would, forget my first appearance before the Supreme Court. The court was then composed of Judge Graves, chief-justice, and Judges Cooley, Campbell, and Christiancy, associate-justices. . . . I found myself upon my feet, brief in hand, but unable to utter a word. The simple formula, 'May it please the court,' lodged in my throat and refused to be uttered. I seemed to feel the earth open beneath me, and was upon the point of taking my seat when I heard the voice of Judge Cooley, full of gentle encouragement, calling my attention to a certain case I had cited in my brief, and asking if I had the volume before me. The ice was broken, and I proceeded with the argument.

While the qualities to which reference has been made are important in the appellate judge and tend to gain for him the confidence, respect and esteem of the bar, the judicial measure of the man is nevertheless to be found very largely in the record of his judgments. And measured by his standard, Judge Cooley must be accorded a place in the front rank. In his haste he occasionally made mistakes and sometimes, perhaps, reached wrong conclusions, but such

⁷ "In Memoriam," Thomas M. Cooley, 119 Michigan Reports, XXXVII, LXIII, LIII.

defects were rare. I am very sure it may be said that Judge Cooley never wrote a poor opinion. He wrote very many good ones and some of exceptional excellence. Probably no judge upon a state supreme bench ever left a record that, all things considered, is superior to his. In reading his opinions, one is impressed first by the power of the man to reach at once the real merits of the case, to dispose of the questions in their logical order, giving to each only such attention as its importance demands, and by his lucid and forceful English. From premise to conclusion his argument is always logical, compact and definite. Legal principles are stated with the utmost clearness and precision and are marshaled in such a way as to show distinctly the basis of his conclusions. One feels that the opinion came out of the brain of the man who wrote it, and that it is not the mere reflection of another's learning, and furthermore one is never in doubt as to what the writer means. To lumber opinions with long quotations, or to turn aside into the confusing fields of *obiter dicta* are sins of which Judge Cooley was never guilty. Another quality that impresses the reader is the independence of the writer in thought and judgment. It is perfectly apparent that while precedents were useful to him, they were not his master. Judicial authorities were his guides and helps, but he had the good sense to understand that such authorities should be interpreted in the light of the conditions that gave them being and that their conclusions

should be followed only when it clearly appears that similar conditions demand their application. Yet Judge Cooley's opinions clearly indicate a safe conservatism. It has been truly said that "he was slow to disturb the settled trend of the law to meet the requirements of special cases." He recognized fully the difficulties and dangers that inevitably follow a departure from the fundamental principles of our jurisprudence. But notwithstanding his conservatism, it is distinctly apparent in his opinions that his mind was always on the alert to discover the equities of the case. While he would enforce a hard and fast rule of law that was grounded in principle, if the case came squarely within its provisions, yet his sense of justice would not allow this if oppression would follow and there were equities with which he might temper his conclusions. This quality of the man is well illustrated in the very first opinion that he wrote,⁸ wherein he refused to allow a case to be governed by the letter of the statute of frauds, the facts clearly indicating that to do so would convert the statute into an instrument of fraud. It has been well said by an associate upon the bench that his opinions "are lasting monuments of his legal attainments, his love of justice and his broad and correct views of the law in its application to the affairs of men."

To examine in detail individual opinions, or to quote from them at length, would not accord with

⁸ *Laing vs. McKee*, 13 Michigan Reports, 124.

the purpose of this paper, yet a brief reference to one or two, with quotations therefrom, will probably serve to give the reader a better idea of Judge Cooley's judicial reasoning and of his clear and forceful style than can be conveyed by description alone. His opinion in *Sutherland vs. The Governor*,⁹ is one that challenges attention. The case arose upon an application to the Supreme Court for an order requiring the Governor of the state to show cause why he should not be compelled to issue his certificate showing that a certain ship canal and harbor had been constructed in conformity with the acts of Congress making a land grant for the same and the acts of the Legislature of the state conferring a grant upon a corporation which the relators in the case claimed to represent. The purpose of the certificate was to furnish to the beneficiaries under the land grant the evidence provided by law of their right to the land. It was admitted by the Governor that the canal and harbor had been constructed in a proper manner, but he insisted that the spirit and intent of the federal and state statutes had not been complied with as the canal had been constructed upon private property and that for this reason the public would not be assured of the benefits anticipated. While it was conceded by the relators that the court would have no jurisdiction to require and compel the performance by the Governor of political duties, or the duties devolving upon him as a component part of

⁹ 29 Michigan Reports, 320.

the Legislature, it was claimed that the act called for was purely ministerial, and hence one that could be compelled by a party in interest. In the course of his opinion, Judge Cooley says:

It may be doubted if this concession would not require us to dismiss the present application, if not to deny our jurisdiction in all cases where the Governor is respondent and his executive action or duties are involved. There is no very clear and palpable line of distinction between those duties of the Governor which are political, and those which are to be considered ministerial merely; and if we should undertake to draw one, and to declare that in all cases falling on one side the line the Governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation, and the cases would be numerous in which neither the Governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would be appealed to by every dissatisfied party to subject a co-ordinate department of the Government to their jurisdiction. However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons. Moreover, it is not customary in our republican government to confer upon the Governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever; and the presumption in all cases must be, where a duty is devolved upon the chief executive of the state rather than upon an inferior officer, that it is so because his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties. And if we concede that cases may be pointed out in which

it is manifest that the Governor is left to no discretion, the present is certainly not among them, for here, by the law, he is required to judge, on a personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer or department.

Judge Cooley then proceeds to discuss the case upon broad general principles that under our system necessarily underlie a controversy like the one before the court. He says:

Our Government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the Constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties. It is true that neither of the departments can operate in all respects independently of the others, and that what are called the checks and balances of government constitute each a restraint upon the rest. . . . It is mainly by means of these checks and balances that the officers of the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment, and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the Constitution is its equal.

It has long been a maxim in this country that the legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered. If it could, constitutional liberty would cease to exist; and if the leg-

islature could in like manner override executive action also, the government would become only a despotism under popular forms. On the other hand it would be readily conceded that no court can compel the legislature to make or to refrain from making laws, or to meet or adjourn at its command, or to take any action whatsoever, though the duty to take it be made ever so clear by the Constitution or the laws. In these cases the exemption of one department from the control of the other is not only implied in the framework of government, but is indispensably necessary if any useful apportionment of power is to exist. It remains then to be seen on what grounds an intervention in the case of executive duties can be justified, when the other departments, acting within their respective spheres, are admitted to be so entirely independent.

After arguing that it cannot be on the ground that the executive is only a single person, as the process of the courts will reach an aggregate body as well as a single person, or because the reference of a duty to an aggregate body raises an implication that it is entrusted to its judgment or discretion any more than if it were referred to one person only, as the nature of the act to be done must generally determine whether or not it is discretionary and not the number of persons who are to do or decide upon doing it, Judge Cooley continues:

One reason very strongly pressed why the Governor is subject to process in cases like the present is, that the act required is not to be done in performance of an executive duty imposed by the Constitution, but is in its nature a ministerial act, provided for by statute, and which might, with equal propriety, have been required of an inferior officer, who, beyond question, could have been compelled by *mandamus* to take the necessary and proper action in the premises. And the question is put with some emphasis, whether, when individual interests depend upon the performance of minis-

terial action, to which the party is entitled of right, the question whether there shall be a remedy or not can depend upon the circumstance that in the particular case the ministerial action is required of a superior officer when there is no reason in its nature why it might not have been required of an inferior.

After referring to several cases that apparently sustain the view suggested, as having been based upon the *dictum* of Chief-Justice Marshall in *Marbury vs. Madison*, "that one of the heads of department in the Federal Government might be compelled by *mandamus* to perform a ministerial duty; a *dictum* which cannot be understood as expressive of the opinion of that eminent judge that the President was subject to like process, but which is wholly inapplicable to a case like the present, unless it goes to that extent." He concludes his discussion of the proposition as follows:

When duties are imposed upon the Governor, whatever be their grade, importance or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a Secretary of State, or a sheriff of a county or other inferior officer, and that inasmuch as in case it had been so imposed, there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the Governor himself is guilty of a similar neglect. The apportionment of power, authority and duty to the Governor, is either made by the people in the Constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the Governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior offi-

cer had been required to perform it. To do this would be not only to question the wisdom of the Constitution or the law, but also to assert a right to make the Governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which are meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the Government.

For the foregoing and other reasons to which reference need not be made, the order to show cause was denied.

An opinion by Judge Cooley that attracted much attention in the profession at the time it was delivered, not only in Michigan but in other states as well, is the one given by him in *The People vs. Salem*.¹⁰ The power of the Legislature to authorize municipalities to issue bonds in aid of railway construction is denied in this case, Judge Cooley taking the position and maintaining it in a masterly argument that upon the broad ground that the object to be promoted being private and not public, it could not be provided for by taxation; that the Legislature, independently of any specific constitutional objections, could not confer the necessary authority. The argument in brief is that the building and operating of a railroad being essentially a private enterprise, the burden cannot in any part be

¹⁰ 20 Michigan Reports, 452.

made a public one without violating the inherent and fundamental principle of taxation that a tax must be imposed for a public and not for a mere private purpose. Judge Cooley's opinion in this case is a model of judicial reasoning and must be read as a whole to be fully appreciated, yet the quality of it may be gathered to some extent from one or two brief quotations:

In the present case it appears that the object of the burden is not to raise money for a purpose of general state interest. Its object, on the contrary, is to create a demand which shall be a burden upon a small portion of the state only. On the ground of local benefit a small district of the state is to be taxed to encourage a local enterprise, which it is supposed will be of such peculiar local advantage that this district rather than the state at large, or any greater or smaller portion of the state, should contribute to its construction. The road, when constructed, is nevertheless to be exclusively private property, owned, controlled, and operated by a private corporation for the benefit of its own members, and to be subject to the supervision and control of the state only as other private property is, with such few exceptions as the state in granting the corporate powers has stipulated for in order to secure impartiality in the management of its business, and to prevent extortion. Primarily, therefore, the money, when raised, is to benefit a private corporation; to add to its funds and improve its property; and the benefit to the public is to be secondary and incidental, like that which springs from the building of a grist-mill, the establishment of a factory, the opening of a public inn, or from any other private enterprise which accommodates a local want and tends to increase local values.

A railroad, however, it is said is a public highway, and as such its construction is a public purpose, which may be accomplished through the instrumentality of the sovereign power of emi-

nent domain even when individuals, and not the state, are to own and control it. This argument is supposed to possess great force, and it therefore becomes our duty to examine it with some care. It is true that a railroad in the hands of a private corporation is often spoken of as a public highway, and that it has been recognized as so far a public object as to justify the appropriation of private property for its construction; but this fact does not conclusively determine the right to employ taxation in aid of the road in the like case. Reasoning by analogy from one of the sovereign powers of government to another, is exceedingly liable to deceive and mislead. An object may be *public* in one sense and for one purpose, when in a general sense and for other purposes, it would be idle and misleading to apply the same term. All governmental powers exist for public purposes, but they are not necessarily to be exercised under the same conditions of public interest. The sovereign police power which the state possesses is to be exercised only for the general public welfare, but it reaches to every person, to every kind of business, to every species of property within the commonwealth. The conduct of every individual and the use of all property and of all rights is regulated by it, to any extent found necessary for the preservation of the public order, and also for the protection of the private rights of one individual against encroachments by others. The sovereign power of taxation is employed in a great many cases where the power of eminent domain might be made more immediately efficient and available, if constitutional principles would suffer it to be resorted to; but each of these powers has its own peculiar and appropriate sphere, and the object which is *public* for the demands of one is not necessarily of a character to permit the exercise of another.

I have said that railroads are often spoken of as a species of public highway. They are such in the sense that they accommodate the public travel, and that they are regulated by law with a view to preclude partiality in their accommodations. But their resemblance to the highways which belong to the public, which the people make and keep in repair, and which are open to the

whole public to be used at will, and with such means of locomotion as taste, or pleasure, or convenience may dictate, is rather fanciful than otherwise, and has been made prominent, perhaps, rather from the necessity of resorting to the right of eminent domain for their establishment than for any other reason. They are not, when in private hands, the *people's highways*; but they are private property, whose owners make it their business to transport persons and merchandise in their own carriages, over their own land, for such pecuniary compensation as may be stipulated. These owners carry on for their own benefit a business which has indeed its public aspect inasmuch as it accommodates a public want; and its establishment is consequently in a certain sense a public purpose. But it is not such a purpose in any other or different sense than would be the opening of a hotel, the establishment of a line of stages, or the putting in operation of a grist-mill; each of which, may under proper circumstances be regarded as a local necessity, in which the local public may take an interest beyond what they would feel in other objects for which the right to impose taxation would be unquestionable. The business of railroading in private hands is not to be distinguished in its legal characteristics from either of the other kinds of business here named, or from many others which might be mentioned; but in the case of *Weeks vs. Milwaukee*, the Supreme Court of Wisconsin justly treated with very little consideration the claim of a right to favor, under the power of taxation, the construction of a public hotel, though the aid was to be rendered expressly "in view of the great public benefit which the construction of the hotel would be to the city." The Court expressly declared that the public could not be compelled to aid such an enterprise from any regard to the incidental benefits which the public were to receive therefrom. . . .

When we examine the power of taxation with a view to ascertain the purposes for which burdens may be imposed upon the public, we perceive at once that necessity is not the governing consideration, and that in many cases it has little or nothing to do

with the question presented. Certain objects must of necessity be provided for under this power, but in regard to innumerable other objects for which the state imposes taxes upon its citizens, the question is always one of mere policy, and if the taxes are imposed, it is not because it is absolutely necessary that those objects should be accomplished, but because on the whole it is deemed best by the public authorities that they should be. On the other hand certain things of absolute necessity to civilized society the state is precluded, either by express constitutional provisions, or by necessary implication, from providing for at all; and they are left wholly to the fostering care of private enterprise and private liberality. We concede, for instance, that religion is essential, and that without it we should degenerate to barbarism and brutality; yet we prohibit the state from burdening the citizen with its support, and we content ourselves with recognizing and protecting its observance on secular grounds. Certain professions and occupations in life are also essential, but we have no authority to employ the public moneys to induce persons to enter them. The necessity may be pressing, and to supply it may be, in a certain sense, to accomplish a "public purpose;" but it is not a purpose for which the power of taxation may be employed. The public necessity for an educated and skillful physician in some particular locality may be great and pressing, yet if the people should be taxed to hire one to locate there, the common voice would exclaim that the public moneys were being devoted to a *private* purpose. . . .

By common consent also a large portion of the most urgent needs of society are relegated exclusively to the law of demand and supply. It is this in its natural operation, and without the interference of the Government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants and professional men, and that determines when and where they shall give to society the benefit of their particular services. However great the need in the direction of any particular calling, the interference of the Government is not tolerated, because, though it might be supplying a public want, it is considered as invading the do-

main that belongs exclusively to private inclination and enterprise. We perceive, therefore, that the term "public purpose," as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the object for which, according to settled usage, the Government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality.

Judge Cooley attempted in this case to correct what he regarded as a great evil, namely, the tendency of municipalities to burden themselves by taxation for the purpose of encouraging railway construction which he regarded as essentially a private enterprise. His conclusion was in conflict with numerous authorities which in many jurisdictions had sustained the right of taxation for this purpose. And he failed in the attempt, excepting in his own state, for elsewhere the authority of this case is not recognized. Indeed, the Supreme Court of the United States sustained bonds based on the very statute that in this case was held to be void.

Although he had great ability as an appellate judge and made a name upon the bench that few have equaled, Judge Cooley's national reputation began with, and is still largely based upon his law books, and particularly upon his great book upon Constitutional Limitations. His permanent fame as a distinguished jurist will undoubtedly rest upon this great work. No American law book was ever accorded more marked recognition, and none ever had

or probably ever will have a more extended influence. And yet the book was probably the result of an incident that at the time of its occurrence made little impression upon the minds of those concerned. I give it in the words of one of the associates of Judge Cooley upon the bench. He was speaking of the organization of the work in the Department of Law of the State University, as it had to do with Judge Cooley.¹¹

As the topics for each lecturer were at first arranged, constitutional law was not in the series. It was not added until the next year. . . . To show what circumstances, small and untoward in themselves, often will turn the trend of our fortunes and make or unmake us, I will relate the circumstances, as I heard them from Judge Cooley, which originated, developed, and brought out "Cooley's Constitutional Limitations." He said that, in consultation, the Faculty determined that this subject should be added to the course; that, in his own mind, he had immediately felt that Judge Campbell, owing to his great knowledge of the law, his experience in the practice of it, and his great ability upon the bench, was the best qualified to lecture upon that subject, and he so suggested; and Judge Walker was of the same opinion. But Judge Campbell absolutely declined to take the subject, stating that he had his own ideas of constitutional law, and was aware that they differed from those of many eminent jurists, and that he absolutely declined to lecture upon that subject. Judge Cooley then suggested that Professor Walker take the subject, when he also absolutely declined, and nothing was left but for Judge Cooley to take it up and lecture upon it. These lectures and his study of the subject culminated in "Cooley's Constitutional Limitations," which first appeared in 1868, and established the reputation of

¹¹ From the remarks of the late Judge John W. Champlin upon the occasion of the Memorial Exercises in the Supreme Court, 119 Michigan Reports, LVIII.

Judge Cooley as one of the greatest living authors upon one of the greatest living subjects of the day. This opportunity was not seized, but was thrust upon him, and the performance of the task attests at once his genius and ability as a jurist in this almost untrodden field of thought.

The circumstances that compelled Judge Cooley to give careful and studious attention to constitutional subjects were not only fortunate for him but for jurisprudence as well. His mind was naturally adapted for the study and development of such subjects, and he was well fitted for the task by his previous systematic reading in American history and his deep sympathy with the constitutional restraints that the abundant caution of the fathers had imposed. That he was a firm believer in the fundamental doctrine of our institutions, is unmistakably apparent in every chapter of the book. He wrote, as he says in his preface, "with greater faith in the checks and balances of our republican system, and in correct conclusions by the general public sentiment, than in a judicious, prudent, and just exercise of unbridled authority by any one man or body of men, whether sitting as a legislature or as a court." The result was a book that is safely conservative but at the same time abundantly suggestive. He necessarily covered fields that were wanting in the guides that judicial interpretation furnishes, and in this part of the work, the great constructive ability and sound judgment of the man stand out in bold relief. The fact that the courts in subsequent decisions have almost without exception adopted his views upon questions con-

sidered by him that had not received judicial determination at the time that he wrote, is a testimonial of excellence probably never before accorded to the same extent to a legal author. This and the further fact that in the treatment of questions that had been settled by the courts, he stated the law as it had been settled, clearly and fully and without any attempt to interpose his own views, have commended the book to the profession and the courts as an authority of the very highest order. In the field of constitutional construction it stands without a rival; in form and substance, it is and always will be a great legal classic. It has been said with truth that this great work "has made Judge Cooley's name respected wherever men study American constitutional law."

But before the verdict of the profession had settled the question, Judge Cooley apparently had a very modest idea of the value of his work. This was characteristic of the man. In his uncertainty, he submitted the manuscript to two of his associates upon the bench and their enthusiastic comments gave him greater confidence. This, however, was soon to be shaken. The book had been written without a publisher in view. And he soon found that publishers as well as he doubted its value. It was rejected by the first to whom it was submitted, a mistake the senior member of the firm once said to the writer that he would never cease to regret to his dying day. It looked for a time as though the author must be his own publisher if the book were to see the

light. But the manuscript was finally, though with considerable hesitation, accepted by a prominent house, the members of which were surprised as well as gratified by the immediate and great success of the book.

At the time this work was published, Judge Cooley's name was practically unknown in the field of legal authorship. He had then, to be sure, been upon the Supreme Bench of the state for three years and had written some excellent opinions. He had been a member of Law Faculty of the State University for nearly ten years, and had attained an extended reputation as a lecturer of great ability and power, particularly upon constitutional subjects. He had also contributed occasional articles to legal periodicals and had published a digest of the decisions of the State Supreme Court. He was, moreover, known to the profession of the state as a thorough student of the law and as a writer of exceptional clearness and force. But he had never before attempted a sustained work covering an entire field of jurisprudence. That his first effort should result, as it undoubtedly did, in the great work of his life, was due to several causes that it may not be inappropriate to consider.

The field was practically a new one. Judge Cooley preëmpted it and his occupation was so thorough and complete in every particular that no one has since appeared to question his title, accorded to him by the united opinion of the profession, as the great

authority upon constitutional limitations. Much had been written upon American constitutional law, but it had been chiefly upon the interpretation of the national Constitution. It was left for Judge Cooley at a comparatively late date to discuss the limitations imposed by the national Constitution and the constitutions of the states upon the legislative power of the states. The opportunity was exceptional. The time of publication, moreover, was fortunate, for the people, particularly in the south, were then intensely interested in constitutional questions. Judge Cooley had the ability to discover the opportunity, and he had what was of more importance, the good judgment to plan a work and the constructive power to execute a work that would be of general application. The men capable of grasping such a situation and mastering it are few. The difficulties in the way had probably prevented an earlier work upon the subject. By reason of their differences in detail, the state constitutions would ordinarily be thought to present separate and distinct fields, each peculiar to itself, and the ordinary student would conclude that a treatise upon the state constitutions would involve the separate consideration of each instrument. Such a work would necessarily be of great length and would not appeal to the profession as a whole. This Judge Cooley appreciated. He, therefore, wisely concluded to omit details, excepting by way of occasional reference, and to confine the discussion to the great general princi-

ples that are common to all the constitutions. This plan enabled him to develop in a large way such general and fundamental subjects as the formation, amendment and construction of state constitutions, the powers of the legislative department, the enactment of laws, the circumstances under which a legislative act may be declared unconstitutional, the several grades of municipal government, constitutional protections to person and property and to personal liberty, protection of property by the "law of the land," liberty of speech and of the press, religious liberty, the power of taxation, eminent domain, the police power of the states, and the expression of the popular will. As introductory to the foregoing he presents a brief but comprehensive view of the powers and restrictions of the national Constitution.

But it is one thing to hit upon such a plan and quite another to execute it effectively. This requires constructive ability and powers of generalization of a high order; it requires also a sense of proportion and literary skill. These qualities, as already suggested, Judge Cooley possessed in no ordinary degree. He had, moreover, what is quite as essential, a genius of hard work. It has been truly said of him that "nature gave to him an unusually clear and analytical mind, and a courage undaunted by any difficulty or mountain of labor." To the preparation of this volume he devoted years of systematic study and careful thought. It represents the most thorough and exhaustive work of his life. That

there was a demand for such a book, particularly at the time of its appearance, was a circumstance that undoubtedly contributed somewhat to its success, but the principal reason for its commanding and continued influence is to be found in the fact that upon every page it bears the impress of masterly ability, and conscientious and thorough work. The writer who calls it "the chiefest law book of this generation," does not exaggerate.

In 1870 Judge Cooley published his edition of Blackstone's Commentaries which is still recognized as one of the leading American editions of that famous work. As introductory he incorporated, *Suggestions upon the Study of the Law*, which have been an inspiration and guide to thousands of law students. In 1874 he prepared an edition of Story's Commentaries on the Constitution of the United States, adding greatly by his notes and comments to the value of the work. His treatise on Taxation appeared in 1876, his work on Torts in 1879 and his Principles of Constitutional Law in 1880. The last named work was prepared primarily for the use of students in law schools and other institutions of learning. In it the author presents briefly yet comprehensively the general principles of constitutional law as developed under the American system both national and state. It at once became popular with teachers and students and still holds its place as the leading elementary text-book upon the subject. New editions of these books have appeared from time to

time, and they are still recognized by the profession as works of great accuracy and merit.

Judge Cooley's remarkable success as a law writer was largely due to his ability to extract from a multitude of cases the essential principles involved, to arrange them in logical order and to state them, with the reasoning upon which they were based, accurately, clearly and briefly. The practitioner soon discovers that the reasoning and conclusions of the text are amply supported by the authorities cited. While the author wisely confines himself to a statement of the law as found in the decisions of the courts and rarely indulges in criticism or independent suggestion as to what the law should be, yet the statement of it is his statement; it bears the stamp of individuality; it shows the force and grasp of the trained and masterful mind; and one in reading feels that the book itself is an independent authority. This means, of course, that the book has in it the essential elements of a treatise, and that it is not a mere compilation from the cases. But I doubt if Judge Cooley's later law books will contribute materially to his permanent fame as a jurist. This will rest mainly upon his great ability as an expounder of constitutional subjects. Not that his later works are inferior in any particular; they are not inferior, but they certainly do not reach the high standard of distinct superiority that characterizes his *Constitutional Limitations*, nor are they of such excellence as practically to hold their respective fields alone as that

work holds its field. They must always come into competition with the works of other authors of at least equal merit.

But Judge Cooley's literary activity was by no means confined to the writing of legal treatises. He prepared the legal articles for the second edition of the *American Encyclopædia* and wrote many of the articles for the *Encyclopædia of Political Science*. He was a constant contributor to law periodicals, his articles in these publications embracing a great variety of topics. He also wrote numerous articles for leading magazines upon various subjects of popular interest. Such was his standing as a clear, forceful and sane thinker that his utterances upon public questions were regarded as of the first importance, and they exerted an extended influence.¹²

In 1885, Judge Cooley, Senator Edmunds, Francis Wharton and others were invited by the editor of the *Century Magazine* to give their views upon the question: What shall be done with our ex-Presidents? Judge Cooley, in his article, contests the suggestion that ex-Presidents should become life senators. "Allow them," he says, "gracefully and with dignity, if they will, to enjoy the proud position of 'first citizen of the republic.' Their lives in retirement, if they

¹² Some of the more notable of his contributions upon subjects of public interest are the following: Checks and Balances in Government, *International Review*, 1876; Limits to State Control of Private Business, *Princeton Review*, 1878; Presidential Inability, *North American Review*, 1881; Arbitration in Labor Disputes, *The Forum*, 1886; Federal Taxation of Lotteries, *Atlantic Monthly*, 1892; Grave Obstacles to Hawaiian Annexation, *The Forum*, 1893.

be such as belong to an illustrious career, will be a continuous and priceless public benefaction. If they bore themselves worthily in office, party asperities will begin immediately to wear off, for their virtues will be exalted in public estimation, and their homes will become pilgrim shrines of patriotism. If they have been incompetent or otherwise unworthy, the shortest dismissal to oblivion is best for them and best for the country."

As a speaker upon public occasions, Judge Cooley was effective, not because of the graces of the orator, for these he did not possess, but by reason of his grasp upon the fundamentals of his subject, and his clear, simple and yet forceful development of it. He was frequently called upon for public addresses particularly before bar associations and learned societies. His reputation as a profound student of public questions was thereby extended, and some of his efforts in this field will doubtless contribute to his permanent fame.

So far as the writer has been able to discover, there is no complete list of Judge Cooley's contributions to the periodical literature of the day or of his public addresses, but his activity in these directions was certainly great and his productions cover a wide range of legal and political questions.¹³

¹³ Among those particularly worthy of mention are his address before the South Carolina Bar Association, in 1886, upon the Influence of Habits of Thought upon our Institutions, an address before the Indiana Historical Society, in 1887, upon The Acquisition of Louisiana; an address upon The Uncertainty of the Law before the Georgia

It has been said, and perhaps with truth, that Judge Cooley's opinions upon public questions appeared sometimes to be colored by the circumstances of his life. He spent a large part of his active career upon the bench and in the teacher's chair. As a judge he exercised a controlling influence in declaring the law, and as a teacher in expounding it. In each capacity he reached his conclusions by processes of argument that to him were satisfactory, but in each capacity he spoke as it were *ex cathedra* and perhaps without a full appreciation always of the influence of circumstances upon the affairs of life both private and public. As one of his associates upon the Law Faculty has well said:¹⁴

He had, perhaps, too much confidence in the power of argument. He made an able address before the Georgia State Bar Association, seeking to show, contrary to the common opinion, the certainty of the law. If he had spent his life at the bar trying to ascertain what the courts will decide on questions which arise in litigation, his views might have been different. And when, after he retired from the bench, he gave counsel as a lawyer, or opinions as one of the Commerce Commission, his views were overruled by the courts perhaps as often as are those of other eminent lawyers. I think he had more faith than history will

Bar Association, in 1887; an address before the Commercial Club of Boston, in 1888, on The Interstate Commerce Law—Its Operation and Results; an address on the Promulgation of the Constitution of Japan delivered in 1889 at Johns Hopkins University; an address delivered the same year before the New York Bar Association upon The Comparative Merits of written and prescriptive Constitutions; and his address as President of the American Bar Association in 1894 upon the Lawyer as a Teacher and Leader.

¹⁴ Memorial address of Hon. Charles A. Kent, 1899.

justify in constitutional objections to national expansion. Such matters are usually determined by the aspirations and passions of the people, as voiced by their political leaders. Constitutions bend to their will, and against annexation the courts are powerless. He had, also, what seems to me too great confidence in the judiciary as a bar to executive and legislative usurpation and as a defense against all injustice.

These criticisms are probably just, but it may be said, I think, that few men similarly situated have been less influenced by environment and habit than was Judge Cooley.

The remarkable versatility of the man and the readiness with which he mastered new situations and new problems are seen in that part of Judge Cooley's career that was devoted to practical questions of transportation. When it is remembered that up to 1882, his entire active life had been given to literary and professional pursuits, and that he had come into contact with the practical side of business and commerce only indirectly through his experience upon the bench, it is a matter of surprise that his success in a preëminently practical field should have been so marked. In 1882, he was appointed one of three commissioners by the great trunk lines terminating in New York, Philadelphia and Baltimore to determine as to what, if any, differential rates should be allowed on freights to and from each of these cities. The commissioners spent several months in taking testimony, and rendered what was generally regarded as a very able report, though they did not by their finding disturb previous conditions. This report was

written by Judge Cooley. During the same year he declined to serve as a member of a board of general railroad arbitration, but on two occasions after this he acted in the capacity of special arbitrator and passed upon questions of grave importance. Judge Cooley retired from the bench in 1885, for the purpose apparently of devoting himself to his university duties and to literary pursuits and of giving some attention to private practice. His services as counsel in important cases were at once in demand, and he found himself fully occupied with such engagements and his literary labors. But he was not to enjoy the freedom of private life. In December, 1886, he was appointed by Judge Gresham, of the United States Circuit Court, receiver of the Wabash railway system lying east of the Mississippi river. The appointment was made without consultation with Judge Cooley and was to him entirely unexpected. But he accepted the trust and entered at once with his characteristic vigor upon the performance of the duties of the office. As general manager of this extensive system, he showed administrative ability of the highest order, such as may ordinarily be expected only after years of preparatory service. It has been said that during his short period of incumbency "he evolved order out of chaos and credit out of bankruptcy" and that "his brilliant management of the Wabash system was a revelation in the line of the control of railways by receivers in this country."

In March, 1887, while serving as receiver, Judge

Cooley was appointed by President Cleveland one of the five commissioners provided for in the Interstate Commerce Act which had recently become a law. The appointment gave universal satisfaction. The press generally, the country over, commended it as wise and fortunate. This new and distinct honor had come unsolicited and in such a way that Judge Cooley felt it his duty to accept. He was chosen chairman by his associates, and his effectiveness as an organizer and his ability to devise ways and means in a field that was practically without precedent, were at once apparent. It is known that Judge Cooley entered upon this work with the expectation that the Commission would be able to accomplish marked results. He realized that the law was probably defective in some essential particulars and that grave difficulties would be encountered in its application, yet he had the belief that it could be made effective, particularly if a moral sentiment in its favor could be aroused among railroad managers. It is needless to say that he became at once a controlling force upon the Commission. In his reports and opinions he discussed the law in all its bearings with marked ability and with great force and vigor. But there were inherent difficulties that no commission, unaided by legislation, could overcome. The decisions of the Commission were not final, and might be overruled by the courts. Moreover, difficulties of interpretation arose that were made more serious by differences of opinion between the Commission and the courts.

And furthermore the labor involved was greater than any five men could hope to accomplish. It was found, too, greatly to the disappointment and sorrow of Judge Cooley, that the apparent willingness at first of railroad companies to conform to the provisions of the act, was not to be their permanent attitude. This was a disappointment and a sorrow, for during the entire period of his service, he devoted to a campaign of education among the railroads his most careful thought and attention, realizing that the effectiveness of the law must depend largely upon their coöperation. Judge Cooley undoubtedly did much for the jurisprudence of transportation, if such a term may be used. It has been said that "he clothed the new act with life and the new commission with dignity and power." He gave to the work the best of which he was capable and devoted to it "an all too generous zeal and a fatally self-sacrificing enthusiasm." His strong constitution at last gave way under the tremendous strain to which it had been so long subjected. Broken in health, he found himself obliged, in September, 1891, to relinquish work, and he tendered his resignation which was accepted with expressions of deep regret. But for occasional lectures at the University, a few contributions to periodicals, and an address as President of the American Bar Association, which at the time was widely discussed, Judge Cooley's retirement from the Commission marked the close of his honorable and distinguished career.

And what was the secret of his success? He was a great teacher, a great judge, a great legal author and withal he was also great in the practical work of administration. Few men have attained distinction in so many fields. Indeed, distinction in any one of them requires the undivided and persistent efforts of most men. Judge Cooley's success was not a matter of circumstance or chance; it was solidly grounded in merit. He was not a genius, but nature endowed him with intellectual powers of a high order. His mind was active, keen and analytical; it seized at once upon the essentials of a problem and proceeded naturally, easily, logically and rapidly to a conclusion. He had in a marked degree the power of generalization. He had, moreover, the intellectual grasp that insured the consideration of questions in a large way and saved him from the errors of a narrow and partial view. No small part of his power lay in his absolute sincerity. This quality of the man stands out in bold relief. To discover the truth and to state it uninfluenced by personal considerations was his constant aim. But all of these qualities together would not have brought the results that Judge Cooley achieved, if he had not had in addition tremendous capacity for work. This characteristic is the one most frequently mentioned as the real reason for his great success. I cannot better convey to the reader a notion of Judge Cooley's capacity in this regard than by quoting from the memorial address of the Honorable Charles A. Kent before the Facul-

ties and students of the University of Michigan. He says: ¹⁵

His capacity may be shown by a brief statement of his work in 1883. I have selected this year, only because I find it easier to ascertain what he did during this time than in other years. His judicial work on the Supreme Bench of the state required him to hear in connection with three associates about six hundred cases, most of them probably on oral argument. He wrote nearly one hundred and fifty opinions, some of them involving questions of difficulty and importance. He had also to examine the cases entrusted to his associates, so as to be able to concur or dissent intelligently. He lectured in the Law Department of the University for a term of six months and in the Department of Political Science for nine months, delivering in each department about fifty lectures of one hour each. He had to spend considerable time in examining candidates for graduation in both departments and in hearing moot court cases in the Law Department. During this year he brought out new editions of his *Constitutional Limitations* and his *Blackstone* and worked on a new edition of his book on *Taxation*. He published articles in the *North American* and *Princeton Reviews* and in the *American Law Register*. He wrote a memorial of the distinguished lawyer, D. D. Hughes, for the American Bar Association. He made several addresses before different bodies. He examined and criticised for their authors two works on legal subjects. He was President of the Law Alumni Association. He acted for the city of Ann Arbor in business of importance. He had a considerable correspondence, mainly with persons out of the state who sought his opinions on legal and other subjects. Meantime he was directing the building of a large addition to his house, and was in frequent consultation with his business associates as to considerable enterprises in which he had a large interest in Bay City and in Lansing. Judge Cooley's industry extended to small details. He read the proofs

¹⁵ Memorial address of Hon. Charles A. Kent. 1899.

of his works. He wrote with his own hand all he composed and copied some things. . . . He had such an insatiable appetite for work that every moment must have its occupation. . . . With increasing age and after he assumed the burdens of the Interstate Commerce work, his passion for labor seemed to increase, and his interest in all recreation, never great, appeared to die out. He became possessed by the demon of work, as other men are with the demon of strong drink. And perhaps this demon was as little amenable to reason, and as fatal in its effects as the other.

Judge Cooley never took a vacation and rarely rested from his labors until forced to do so by failing health. He had not only an enormous capacity for work but an intense love for it. He often declared his work to be his recreation. It goes without saying that in this regard he made a grave mistake. He realized it at last but only when it was too late.¹⁶ "Three years ago," said Chief-Justice Grant, of the Michigan Supreme Court, in his memorial remarks, "I called on him at his home in Ann Arbor. He was reclining near a window in his study, too weak to arise. I had just returned from a few weeks recreation in the country. I told him that I had learned how to rest, and what I had done. He sorrowfully looked out of the window for a moment, and then said, 'I am glad of it; I ought to have done it long ago, but it is too late now.' He spoke as one who knew that his work was done, but who awaited with the utmost calmness the arrival of the grim messenger."

At the age of sixty-seven, his life work was done

¹⁶ "In Memoriam, Thomas M. Cooley," 119 Michigan Reports, LXII.

and although he lived for several years they were years of enforced idleness and consequent sorrow.

This sketch would be incomplete without some reference to Judge Cooley the citizen and the man. Notwithstanding his intense interest in professional and literary pursuits, he always found the time to meet fully his public and social obligations. During his mature years he was identified with the Republican party, but he was never an extreme partisan, and always exercised the liberty of voting as his judgment dictated. With him the public good was always the essential consideration. He was naturally conservative, and if he were alive to-day, he would not probably be with his party in its policy of territorial expansion. Public-spirited as a citizen, he was always ready to devote his time and energy and money for the public good. No private life could have been more pure and beautiful than his. He loved his family, his home and his friends, and was never so happy as when contributing to the happiness of others. Modesty, simplicity, purity, sincerity and kindness were the characteristics of his nature. Deeply reverent in spirit, though never subscribing to any particular creed, he was always a regular church attendant and essentially a religious man. In his death the state of Michigan lost her most distinguished citizen and the country its most distinguished jurist.

MATTHEW HALE CARPENTER.

MATTHEW HALE CARPENTER

From a large photograph by Sein of Milwaukee. The photograph is the property of Mrs. Carpenter and is reproduced by her permission.



MATTHEW HALE CARPENTER.

1824-1881.

BY

JOHN BOLIVAR CASSODAY,*

Late Chief-Justice of Wisconsin.

THE reputation of a state depends largely upon the character, ability, purpose and intellectual force of its representative men. For a third of a century, Matthew Hale Carpenter was a citizen of Wisconsin and, for most of that time, a distinguished member of the Wisconsin bar. He was born at Moretown, in Washington county, among the mountains of Vermont, December 22d, 1824, and died at Washington, D. C., February 24th, 1881. He took up his residence in Beloit in the county of Rock and state of Wisconsin about the first day of June, 1848. This was only a few days after the state had been admitted into the Union. He lived in Beloit until October, 1858, when he moved to Milwaukee, where he continued to reside until his death. He never held any office except that of District Attorney for Rock County, from January, 1853, to January,

* Chief-Justice Cassoday died December 9th, 1907. He was a justice of the Supreme Court of Wisconsin since 1880, and Chief-Justice since 1895.—Ed.

1857, and United States Senator, from March 4th, 1869, to March 4th, 1875, and again from March 4th, 1879, to the time of his death.

The purpose of this article is to give a sketch of Mr. Carpenter as a lawyer, and not as a politician or statesman. In fact, his best friends have never claimed that he possessed the aptitude or finesse essential to become a successful politician. On the contrary, he seems to have despised mere politics. He once said in the senate in grave debate, that "politics is one of the strangest subjects that ever perplexed the human mind. When politics comes in, reason and justice go out. We see it illustrated to-day on both sides of the water." So he had but little regard for that phase of statesmanship which depends entirely upon diplomacy. Once, in answer to Charles Sumner in the senate, he drew a contrast between a statesman, who defended his position by mere abstract, philosophic reasoning and glittering generalities, and a lawyer, who, from practice and necessity, was compelled to adhere to the facts of the case under consideration. Mr. Carpenter, or "Matt.," as he was in the habit of subscribing his name to letters and legal papers and as he was usually called among his professional brethren, was bold, clear, direct, aggressive and commanding—qualities very useful to an eminent lawyer. He was not only a brilliant advocate, but an able, learned and profound lawyer. To appreciate his character and ability as such it is necessary to trace his career from childhood to young

manhood, and from young manhood to complete intellectual development, and then to the subsequent mastery of his intricate profession.

His childhood and early boyhood were limited by the environment of a country town with small opportunities for learning. His father was a fine-looking man, easy and social in manner, well-posted in politics and a fluent talker, and, from time to time, held the offices of sheriff, deputy-sheriff, constable, justice of the peace, postmaster, and representative in the Legislature, but accumulated very little property. His mother was the daughter of a minister, and a gentle, sweet-tempered, accomplished, Christian woman, who brought up her children accordingly. She died, however, when Matt. was only a little more than ten years of age. Two traits of character were developed in him very early—one was a very decided aversion to manual labor and the other was a strong avidity for books. His father's limited means made it necessary for him to apply himself to labor which he did not like, and to refrain from reading books which he did like. The conflict between the father and the son on these subjects sometimes resulted in the triumph of the one, and sometimes in the triumph of the other. In one respect the son had the advantage of the father—for he was the pet of his grandfather, Cephas Carpenter, who had much experience as a justice of the peace. Although not a lawyer, Cephas Carpenter frequently tried causes against lawyers before other country justices

and was himself a great lover of books. Like most grandfathers he was particularly indulgent to his little grandson; and so would occasionally slip a sixpence, or a shilling, or a quarter into his pocket. Matt. was never a financier in any sense, but he was shrewd enough to husband his resources so acquired. When his father was absent for a time as sheriff or constable, and had directed him to hoe a field of corn or potatoes with the help of an Irishman near, to be hired for one day only, Matt. would, for a consideration, generally succeed in getting the Irishman to complete the job without doing any work himself. Thus, early, he learned that men were generally controlled by some motive, and he never lost sight of it in the trial of causes. There was another circumstance which showed his early aptitude as a lawyer. He and a neighboring boy, living on the opposite side of Mad River, spent most of their time playing together. Finally the fathers consulted as to the best way of getting their sons to work, and the result was that each forbade his son to cross the river. Notwithstanding the injunction, and on a day when his father was absent, Matt. took his position early upon the middle of the bridge, and then whistled for his companion, and when he came soon convinced him that so long as they both remained on the middle of the bridge neither of them would cross the river or disobey his father. Upon another occasion he was directed to hoe a field of corn during his father's absence, and when, on his father's return, he was

reprimanded for leaving weeds between the rows he shrewdly replied that he was not told to hoe the weeds but only the corn. Fortunately for Matt. his father as sheriff had made the acquaintance and secured the friendship of Paul Dillingham, a prominent lawyer of Waterbury in the same county, who subsequently became governor of Vermont and representative in Congress. The result was that Dillingham occasionally called at the Carpenter home and soon became warmly attached to the precocious boy. On one occasion, when Matt. was six or seven years old, Mr. Dillingham went so far as to tell him that when he became fourteen years of age he might come and live with him and he would make a lawyer of him. Absorbed in legal controversies, the subject naturally passed from the mind of Mr. Dillingham, but with the boy it was a serious business proposition. The thought of becoming a member of Mr. Dillingham's family and a lawyer was pondered in his young heart, and as he became older the thought was greatly stimulated by the limitations of his home life. The environment in which he was placed and the hope of becoming a lawyer induced him to apply himself to study with renewed vigor. His mother's early training had given him a religious cast of mind, and this, with his reading of the Bible and committing certain portions of it to memory before he was fourteen years of age, may account for his frequent references to the Scriptures in his arguments and public speeches. Besides, during that time he read

several of the speeches of Clay and Webster and committed some of them to memory. Among others he committed to memory Webster's Reply to Hayne, and upon one occasion, to aid a benevolent enterprise, he recited the whole of it to a crowded house.

On becoming fourteen years of age and having acquired what learning he could from the school at Moretown, with the promise of Mr. Dillingham in mind and with the consent of his father, he started for Waterbury, where he was cordially received by Mr. and Mrs. Dillingham, and at once became a member of their family. For four years and a half he made his home with them and attended the more advanced and progressive graded schools of Waterbury—not missing a term and rarely missing a class. His vacations and holidays and evenings were spent in reading literature and studying the elementary principles of law in Mr. Dillingham's office; and in his absence he "ran the office so far as justice business was concerned." At the end of that period Mr. Dillingham procured his appointment to the Military Academy at West Point; and he entered that institution with a class of fifty-two others, July 1st, 1843. His record while there was in every way creditable and commendable; but after being there two years, he returned "home" to Mr. Dillingham's "on sick leave." As stated by Mr. Dillingham, "partly on account of his health and partly on account of his ambition to become a lawyer, he resigned his cadetship in August, 1845." Thereupon he again entered

upon the study of the law in the office of his foster-father and continued the same, proving himself to be "a most faithful and progressive student," until the November term of the court for 1847, when on the motion and recommendation of Mr. Dillingham he was admitted to the bar of the state of Vermont as an attorney-at-law by Chief-Justice Redfield, who expressed "gratification at his legal attainments and bright prospects of professional success." Mr. Dillingham was proud of his *protégé* and offered to take him in as a partner, but he had "previously resolved to settle in the boundless and growing west" and so declined the offer. Mr. Dillingham then said to him: "If you ever want money, a friend or a home, remember that my purse, myself and my house will be at your service."

Two or three days after he was admitted to the bar he started for Boston, and armed with letters of introduction from Mr. Dillingham and others, he traveled about the city until he discovered the modest sign, "*R. Choate—Counsellor at Law.*" The great advocate was not in his office when he first called and as Carpenter "was not dressed in the latest Boston fashion" and evaded the questions put by the clerks in the office as to what business he desired to have with Mr. Choate, it was only after repeated efforts that he was enabled to meet the great advocate personally. Upon being admitted to his presence "Mr. Choate kindly asked what he could do for him." Carpenter then "exhibited his letters of introduction,

told who he was and what he wanted, and ended by saying that he had journeyed from Vermont to enter the office and study the methods of the greatest jury lawyer in Massachusetts in order to be able to follow his example and reap similar rewards." This frank and simple statement made a favorable impression upon Mr. Choate, who inquired of the clerks whether there was a place for another student in the office; and when told that there was none, he told Carpenter that he would give him a place in his private room and that he could come the next morning, and then instructed his clerks accordingly. On entering his office the next day Mr. Choate found him seated at a small desk which had been ordered for the purpose, studying some of Mr. Choate's most important printed briefs and opinions. To test his ability Choate handed him a letter from an attorney at Exeter, asking his opinion upon a question of law, and told him to answer it. After diligently studying the question with the aid of Mr. Choate's fine library, Carpenter wrote an opinion upon the question in clear and concise form, and then submitted it to Mr. Choate, who, after carefully reading it, said: "Well, Judge, I guess I can put 'R. Choate' to the end of that and tell that lawyer to send me \$100." On being signed, it was inclosed in a note written by Carpenter and sent to the Exeter attorney, who in due time sent the money. The result was that Choate generally addressed Carpenter as "The Judge;" and at times was quite intimate and confidential with him

—explaining to him the importance of studying the underlying principles of the law and never leaving a case “until he had become fully satisfied and convinced upon its every phase and question.” He also showed him the value of practical methods and common wisdom in dealing with men and the secrets of controlling courts and juries. A few months afterwards Mr. Choate’s eyes became weak and temporarily useless. Carpenter then acted as his amanuensis and became an inmate of his “family, as well as his companion in court and in almost all other places.” Thus he became acquainted with Mr. Choate’s method of study and the preparation of his cases and arguments, and the secrets of his work and business. On motion of Mr. Choate, Carpenter was admitted to the Supreme Judicial Court of Massachusetts at its March term for 1848, with Chief-Justice Shaw presiding. He thereupon announced to Mr. Choate his intention of soon starting for Wisconsin, which was about to be admitted into the Union. Choate replied: “I honor your determination, but I was selfish enough to hope you might remain with me; yet, as you have resolved upon this step, you had better not recede from it. Nevertheless, you can always rely upon my friendship. Have you any money?” Carpenter replied that he had no means with which to purchase a law library. “Go, then,” said Choate, “to Little, Brown and Company, select your books and refer them to me for security.” Accordingly, Carpenter selected as many law books as

he dared to, on Mr. Choate's guarantee of credit. He showed the list so selected to Mr. Choate, who said: "Your list is too small;" and thereupon he marked a list of books in the catalogue, which were in the aggregate of the value of \$1,000, and said to Carpenter: "With these tools you can begin something like effective work." When Carpenter was about to start for Wisconsin, Choate asked him how much money he had. He reluctantly admitted that he had only a small amount, but stated that he could get what he wanted from Mr. Dillingham. Disregarding such statement, Mr. Choate handed him enough money to pay his expenses to Wisconsin with this written introduction:

BOSTON, May 25, 1848.

I have great pleasure in stating that M. H. Carpenter, Esquire, is well known to me; that his character is excellent; his talents of a very high order; his legal attainments very great for his time of life; and that his love of labor and his fondness for his profession insure his success wheresoever he may establish himself. He studied the law in my office for the closing portion of his term, and I part with him with great regret. To the profession and the public I recommend (him) as worthy of the utmost confidence, honor and patronage.

RUFUS CHOATE,
Counsellor at Law.

Four days after that was written Wisconsin was admitted into the Union, and a few days after that Carpenter, influenced by "The New England Emigrating Company" formed in Vermont and New Hampshire in 1836, reached Beloit in Rock County,

where he made his home for the first ten years of his practice. At that time Carpenter was not quite twenty-three and a half years of age, but he had studied law for three years under the most favorable circumstances. The character and intelligence of the people of Beloit and of Rock County and vicinity were well calculated to be attracted by the brilliant eloquence and ability of the young lawyer from New England. The territory of Wisconsin was not organized, and the public lands in the southeastern portion thereof were not opened to the public market until 1836—a few months before Michigan was admitted into the Union. About that time the National Bank charter expired and financial distress followed in the east and that led to the Bankrupt Act of 1841. Such conditions and the fact of such lands coming into the public market induced the organization of “The New England Emigrating Company” mentioned. Under the influence of that company a large portion of the land upon which the city of Beloit is now situated was entered as early as November 26th, 1838. The result was that between 1836 and 1850 there was a great rush of emigration from New England, New York and other states to southeastern Wisconsin and particularly to the counties of Rock, Walworth, Racine and Kenosha. Thus Rock County, which had only 480 inhabitants in 1838, in 1840 had 1701 and in 1850 the number had increased to 20,750, whereas the whole state contained 30,945 in 1840, and 305,391 in 1850. Among such immigrants were

many young men from some of the most choice and influential families in the east—including many lawyers who had studied and been admitted to the bar before coming to Wisconsin, and some of whom had been in the territory for years and had become well established in business long before Carpenter made his appearance. Notwithstanding the fact that the field was well occupied in advance by able lawyers, Carpenter received his full share of business from the first, and no young lawyer ever entered a new field with brighter prospects of success than did the subject of this paper. After a few months' experience as a practicing lawyer, however, such prospects were gradually displaced, first by inflammation resulting from a bad cold, which for some months greatly impaired the use of his eyes, and then, by improper treatment from local physicians, which for months completely destroyed his sight and finally threatened him with permanent blindness. Notwithstanding his impaired eyesight, professional business continued to flow in upon him until he was advised by his physician that his only chance of escaping permanent blindness was to go without delay to the New York City Infirmary. Accordingly he started for New York about the last of March, 1849. In a few weeks the \$50 he started with were exhausted and so he found it necessary to write to Mr. Choate and explain to him his actual condition and ask for financial assistance. Mr. Choate at once answered with a sympathetic and cheerful letter, inclosing his check

for a liberal sum of money, with directions to call upon him for further assistance whenever circumstances required. As directed, after a few months, Carpenter wrote to him for more funds, but as Mr. Choate was on a trip to Europe at the time, the letter was unanswered for several weeks. Finally, and when Carpenter was about to be sent to the public hospital, a letter came from Mr. Choate, dated on shipboard, explaining the delay and inclosing a draft sufficiently large to cover his immediate wants and to supply his needs for several months thereafter. After remaining in the infirmary sixteen months the physician in charge consented to his going to Vermont, on condition that he would refrain from reading or writing for at least six months. Accordingly he left New York for Mr. Dillingham's home in the summer of 1850 and remained there for several weeks, wearing dark glasses and a broad shade over his eyes to protect them from the sunlight. He began to improve rapidly and determined to return to the west. Obtaining an "accommodation acceptance" to the amount of \$500 from a friend in Boston, which he secured by a chattel mortgage on his office furniture and a portion of his library, and upon which he drew \$250, after an absence of eighteen months, he returned to Beloit on the last of September, 1850. An intimate friend of his during the time, wrote of him after his death:

I know nothing in regard to the private life of any of my friends who have become famous, which showed such a combination of

pluck, patience and endurance, coupled with trials of the most heart-rending character as were triumphantly endured by Carpenter at that time. . . . He often told me that he regarded that time of trial as one in which there was formed in him more character, more of a feeling of necessity for trust in God, of the vanity of human ambition, of the tenderness of unselfish human love, of the pricelessness of the affections and sentiment that were only strengthened and made more fervent by afflictions, separation and almost utter hopelessness.

So another who was also at that time intimate with him said:

He never heard Carpenter utter a word of complaint or express a regret that fortune was less generous with him than with others—never saw him despondent or wince under any suffering. On the contrary, he seemed even more cheerful and witty, and the sunshine of his soul shed more effulgence than had the light of his wondrous eyes.

The period of his calamity was not without some compensation. During his affliction his mind had been enriched by listening to the reading of a considerable literature and the opinions of Chief-Justice Marshall, Mr. Justice Story, Chancellor Kent and others.

It is not to be inferred from the fact that he returned to Beloit, that his eyes were in a condition to be used for study. On the contrary, obedience to the injunction of the physician at the New York Infirmary when he left that institution, required him to refrain from any reading or writing for at least six months; and that time did not expire until about the first day of January, 1851. It is safe to say that

he did not regain the use of his eyes, even in an impaired condition, until about the time he was twenty-six years of age. This period may be regarded as the real beginning of his practice. His indebtedness for his library and for his "accommodation acceptance" and to Mr. Choate were gradually maturing and there was no way of paying the same or even current expenses except from business subsequently to be performed. The village of Beloit, and the town of that name—six miles square—in which it was situated, together contained at the time only 2,730 inhabitants. They were in the southern part of the county, adjoining the Illinois line. Twelve miles to the north of Beloit was the larger village of Janesville, the county seat.

Most of the lawyers lived in Janesville as the litigation in the county naturally went to the county seat. But Carpenter met the situation with a courage which could not be daunted and a manly enthusiasm which commanded respect and attracted business. His office was soon crowded with all the business he could do with the aid of clerks. The cruel experience he had passed through did not destroy or weaken his faith in the accuracy of his own convictions on questions of law. Thus upon being beaten in two cases by Chief-Justice Whiton sitting at the circuit, he took them both to the old Supreme Court on writs of error, and they were both reversed at the June term of that court for 1852. Such early double victories gave him prestige with the people, the bar

and the courts. A separate supreme court was organized in 1853, and at its first term in June, 1853, Carpenter had three cases. In two of these he was successful. At the December term of the Supreme Court for 1853 he had four cases. In three of them he was successful and in one was beaten. During the first five years of his practice at the Bar he had fourteen cases in the Supreme Court, as will appear by consulting the third volume of Pinney's Wisconsin Reports and the first four volumes of Wisconsin Reports.

So many cases with such remarkable success in the highest court of the state during the first five years of his practice are some indication of the extensive business he must have had in the inferior courts of Rock County and vicinity during the time mentioned. Being restored to health and well established in business and no longer dependent upon eastern friends for assistance, he went east to claim as his bride one whom he had learned to admire while studying law with his foster-father, and to love when she tenderly cared for him at her father's house while he was there during his calamity of blindness in the summer of 1850—Caroline—the accomplished daughter of Governor Dillingham. On returning to Wisconsin he was at once retained in by far the most important case with which he had been connected up to that date, and one which made him famous throughout the state and known among lawyers throughout the United States—Attorney-General *ex rel.* Bashford vs.

Barstow.¹ Mr. Barstow was the rightful governor of Wisconsin from the first Monday of January, 1854, to the first Monday of January, 1856. He had been elected by 5,815 majority and 9,119 plurality and the whole Democratic ticket was elected at the same time. In the summer of 1855 he was renominated as the Democratic candidate for the same office. His Republican opponent was Coles Bashford. The canvass was spirited and aggressive. After the election in November, 1855, the Returning Board, consisting of the Attorney-General, Secretary of State and State Treasurer, all of whom had been elected on the same ticket, declared that Mr. Barstow had been elected by a majority of 157. Charges of fraud were boldly made. The excitement became intense. It soon became apparent that the controversy would find its way into the courts. On the day for inauguration Mr. Barstow took the requisite oath and continued to hold the office of governor under a claim of right. It was conceded that his associates on the ticket had all been elected and were rightfully in office. On the day for inauguration Coles Bashford also took the requisite oath of office and claimed to be the governor of Wisconsin. His demand for the office having been refused, he thereupon, as relator, instituted proceedings by *quo warranto* in the name of the Attorney-General against Barstow in the Supreme Court of the state to determine the right and title of the two contestants for the office. The re-

¹ 4 Wisconsin Reports, 567-621.

lator was represented by Edward G. Ryan, Timothy O. Howe, James H. Knowlton and Alexander W. Randall. Mr. Barstow appeared by Jonathan E. Arnold, Harlow S. Orton and Matthew Hale Carpenter, and they boldly moved to quash the writ and dismiss the proceedings for want of jurisdiction. The contest suggested some unique questions of law as to the dividing line between executive and judicial authority. In such a controversy the merely brilliant advocate with power to sway the multitude would be of no value. Fully comprehending this fact, each party selected for the contest lawyers of known learning in the law and of commanding legal ability. Carpenter at the time was only thirty-one years of age, while the other lawyers in the case were from seven to fourteen years older than he was. To be selected by the sitting governor of the state as one of his counsel in such a case was of itself a great honor, but to be selected by his able and learned associates under the circumstances to make the opening argument on the question of jurisdiction was a still greater honor. His opening sentence will sufficiently indicate the bold and aggressive tone of his argument:

We come here to argue a question of vital importance; we come to resist an attempt to maim the proportions and mar the harmony of our state government by striking down one of its independent departments; we come to resist the endeavor now made to subject the executive to the control of this court.

He was answered by Randall, Knowlton and Howe, and supported by Orton and Arnold. The

court overruled the objection to the jurisdiction and proceeded to consider the merits of the answer, and upon that Mr. Ryan, who was fourteen years older than Carpenter, made a great argument, and judgment was finally entered ousting Barstow and installing Bashford.

From that time forward, Carpenter was justly regarded as one of the foremost lawyers in the state, notwithstanding his age and limited experience and the fact that he resided in a country village. Such was the opinion of the early bar—fully verified by the records of the courts. About August, 1856, Carpenter received a general retainer from a railway company at an annual salary of \$6,000 a year, and in October, 1858, he moved to Milwaukee with his splendid library, and for a short time became a member of the firm of Ryan, Carpenter and Jenkins; but that firm soon dissolved and as early as July, 1859, Ryan and Carpenter found themselves opposed to each other in the celebrated trial of Sherman M. Booth for criminal intimacy with Caroline N. Cook. Ryan aided the district attorney and Carpenter aided the Honorable Henry L. Palmer, now at the head of the Northwestern Life Insurance Company, in the defense. The trial lasted two weeks and the newspapers and the public became involved in the controversy on the theory that the case had some political bearing. The masterly eloquence of both Ryan and Carpenter greatly intensified the feelings of the bystanders and the public generally. It is

said that the noted Thomas Marshall of Kentucky, who was at the time lecturing in the north on Henry Clay, heard the arguments of both Ryan and Carpenter, and then declared that he had never heard them surpassed by Clay or Webster or any other orator. The jury disagreed and subsequently the prosecution was abandoned. Soon after, Carpenter successfully defended Governor Salomon of Wisconsin, who during the Civil War, after having quelled a riot in resisting a draft in one of the counties of the state and arrested and imprisoned the rioters, was sued for false imprisonment.

In obedience to the precept of Mr. Choate, Carpenter was in the habit, as far as possible, of mastering the facts and the law of every case before going into the trial; and then trying the same in pursuance of a preconceived plan. His examinations and cross-examinations of witnesses were generally short and direct, and to the point. The result was that his rapidity of procedure and his bold and aggressive manner frequently confused and sometimes confounded his opponent. In the trial of a cause before a jury he was quite likely to do the unexpected. Very soon after the close of the war he was retained to defend a captain, whose company had just been mustered out of service, for shooting and killing a former member of his company by the name of Jack Shay. They had become very bitter toward each other while in the army. The killing was undisputed; but the circumstances under which the shot

was fired were in dispute. The evidence was close. Mr. Carpenter opened his argument to the jury with this startling statement:

Gentlemen of the Jury: Whatever may be the result of this trial, I congratulate you upon the fact that Jack Shay is dead.

The jury disagreed. Upon a retrial the district attorney, who from the first had been assisted by an able lawyer, made a dull and weak argument to the jury, whereupon Carpenter at once submitted the case to the jury without argument, to the consternation of the district attorney's able assistant. The jury again disagreed and thereupon the prosecution was abandoned.

Once while trying a case before a jury, and after the court had ruled in a certain line of testimony against his repeated objections, the presiding judge put to the witness a leading and very suggestive question, whereupon Carpenter again objected and said:

Your Honor, I am bound to treat with respect every ruling of this court, however objectionable I may deem it to be, but I must insist that this testimony be, at least, filtered through the witness.

The judge saw the force of the objection and at once ruled out his own question.

As Carpenter's field of labor widened, the importance of the litigation in which he was from time to time engaged increased and extended into the federal courts and from thence into the Supreme Court of the United States. Thus, it appears from the records that, as early as 1863, he argued two cases which were

reported in the first volume of Wallace's United States Reports. He also had six cases reported in the second volume of Wallace's Reports, four cases in the third volume, two cases in the fourth volume, one case in the fifth, and seven in the seventh volume, all of which were argued within the short period of five years and before he was elected to the United States senate. Some of these cases were of great public interest and importance. In *Ex parte Garland*,² the question arose whether a lawyer who had been admitted to practice as an attorney-at-law in the Supreme Court of the United States before the war, and had participated in the Rebellion as a high official in the Confederacy, and then, after the war had terminated, had been pardoned by the President of the United States, could practice law in that court without first taking the test oath prescribed by the act of Congress of July 2d, 1862, and the supplementary act of January 24th, 1865, extending the provisions of the original act so as to embrace attorneys and counsellors of the courts of the United States. Mr. Garland was a very prominent lawyer in the state of Arkansas, and his right to practice as such attorney without taking such oath could be granted only in case such acts of Congress were unconstitutional. Mr. Garland's case was made the test for the entire southern bar, who engaged Carpenter to appear as counsel in the case to aid that able lawyer, Reverdy Johnson, of Baltimore, who had volun-

² 4 Wallace's Reports, 333.

teered to support Mr. Garland's application. Their efforts were successful although by a divided court. That case was decided at the December term for 1866. A case of far greater public importance is a case which was argued upon the merits but never reported for reasons which will now be stated. It appears that one William H. McCardle had been arrested and was held in the custody of the Major-General of the United States army for trial by a military commission, under the alleged authority of the reconstruction acts of Congress. November 12th, 1867, McCardle obtained a writ of *habeas corpus* from the United States Circuit Court for the District of Mississippi. On the hearing of the writ he was remanded, November 25th, 1867. Thereupon McCardle appealed to the Supreme Court of the United States and was admitted to bail pending the appeal. Mr. Trumbull, an eminent lawyer of Illinois and chairman of the Judiciary Committee of the United States senate, with Mr. Hughes, moved to dismiss the appeal for want of jurisdiction. The distinguished Jeremiah S. Black of Pennsylvania and Mr. Sharky of Mississippi opposed the motion on the ground that the right to appeal had been expressly given by the Act of Congress of February 5th, 1867, and upon that ground the motion was denied by the unanimous opinion of the court written by Chief-Justice Chase, at the December term of the court for 1867.³ Secretary of War Stanton, with the advice

³ *Ex parte* McCardle, 6 Wallace's Reports, 318.

and consent of the Lieutenant-General of the armies, U. S. Grant, employed Mr. Carpenter to aid Mr. Trumbull in arguing the case on the merits. In preparing his argument, which consisted of one hundred printed pages, Mr. Carpenter occupied Stanton's room. In opening his argument, he said:

This is the first time in the history of the world that a bench of judges has been invoked to redress the wrongs, real or imaginary, of eleven millions of people, and to establish the authority of ten pretending governments. Such controversies have been decided by force, not by reason; in the field, not in the courts. Waterloo determined the fate of Napoleon, and he went in sullen silence to his ocean rock, never dreaming of the *habeas corpus*. No lawyer can argue, no judge decide this cause without a painful sense of responsibility. Its consequences will be upon us and upon our children; and generations yet unborn will rejoice or mourn over the principles to be here established.

After characterizing, in gentle irony, Judge Black's laudation of the court and disparagement of military tribunals acting under reconstruction laws, he said:

When Congress determines any political matter, ever so erroneously in the opinion of this court or the President, its action is final and conclusive. It is far better that individual instances of injustice committed by either department should go unredressed than that the liberties of all should be swallowed up. The rule is general that a discretion committed to one authority is not to be reviewed by another. No principle has been more repeatedly and emphatically declared by this court. . . . Unpleasant as it may be to review the history of the last six years, or dwell upon the wickedness of this Rebellion, in no other way can we properly consider, or correctly determine, upon the existing state of

things. Counsel have done well for their clients by ignoring secession, rebellion and war. They have argued this case as though Mississippi were as innocent as Massachusetts, and had been as faithful to her constitutional duty; and when compelled, now and then, to allude to the fact that war has existed, they have changed the subject as soon as possible, and besought this court to relieve those they represent from the just consequences of their folly and crime. They admit that, during the war, the United States could overthrow and demolish the rebel governments; but they insist that the surrender of Lee and Johnston entitled those governments, or any which the people of those states might establish, to full communion as states of the Union. . . . All admit that the government which existed *de facto* in Mississippi the day before the surrender of Lee and Johnston was subject to the absolute will of the nation. We might have crushed it beneath the iron heel of war. But it is preposterous for counsel to say that by conquering the rebel armies, the only power which could sustain that government, and by effecting complete conquest of the south—its territory, its people, and its rebel governments—Congress lost the right even to make a respectful request in regard to the results of our victory; and that the consequences of this fearful Rebellion, which for four years shook the continent, are to be “trammelled up” by the rules of special pleading, upon a bill in equity.

At the close of the arguments the court took the case under advisement and on March 27th, 1868, and before it was decided, Congress repealed the act of February 5th, 1867, which had given the right to appeal. Eleven days afterwards, Stanton wrote to Carpenter:

In taking leave of you, I can not forbear expressing my very great satisfaction with the able and successful services you have rendered the Government in the important cases committed to your charge in the Supreme Court of the United States.

At the December term of the court for 1868 Trumbull and Carpenter argued that such repealing act should not be construed as having any effect upon the appeal pending before it was enacted, but the court dismissed the appeal for want of jurisdiction.⁴ Thus it appears that before Mr. Carpenter was elected to the United States Senate and when he was only forty-four years of age, he had argued twenty-two cases in the Supreme Court of the United States and among them several of national importance. Of course, most of those cases and very many others had been tried by Mr. Carpenter in the lower courts.

While Mr. Carpenter was necessarily intense and persistent in his professional labors, yet he seems to have had time to express himself as a citizen on most public questions. When that great leader of the Democratic party in the United States senate—Stephen A. Douglas—broke from the administration of President Buchanan in the winter of 1858, Carpenter and other leading Democrats of Wisconsin boldly took the side of Douglas and in a public meeting at Janesville, called for the purpose, so declared in numerous speeches and resolutions. When Douglas visited Wisconsin in the presidential canvass of 1860, Carpenter accompanied him and made numerous speeches in his behalf. In a speech at Watertown on the night before the election, he expressed himself as being full of apprehension of a coming civil war, and boldly declared:

⁴ *Ex parte* McCordle, 7 Wallace's Reports, 506.

Such a war can only be averted by the election of Judge Douglas, and I think all patriots irrespective of party, should turn in with their mighty forces to place him in the President's chair, and thus bridge over the terrible crisis that is pending.

After paying a generous tribute to Douglas, who was a native of the same state with himself, he predicted that, if Lincoln should be elected, the recruiting drum would be heard in less than a year, and in that event he declared that if the first blow would come from the south—if she raised her “hand in violence against the government, the flag and the Union,” he would, “if possible, be the first man in the field in their defense,” and he hoped that every one of his audience would be “ready to fight to the last for the banner and the chart of 1776—for ‘none can die too soon who die for their country.’”

True to his prediction Lincoln was elected, Fort Sumter was fired upon by the South, and the recruiting drum was heard as early as in April, 1861. Public meetings were held throughout the north, and in the first one held in Milwaukee, Mr. Carpenter, among other things, said:

Nearly forty years of profound public tranquillity have passed over and blessed our land. We have forgotten to use the weapons of war and have cultivated the arts of peace. We have engrossed our thoughts and enlisted our hearts in the pursuits of agriculture, manufactures and commerce, and in advancing the arts and sciences most useful to man. No nation has been so blessed—none has so prospered. . . . But now, when we were least looking for it, our trial has come. Prosperity has debauched our people and corrupted our Government. We have grown rich, have waxed fat; and as a nation have become proud and wicked. . . .

With everything to fill the hearts of the American people with thanks to God and love toward each other, God has been forgotten and brother is in arms against brother. The union of these states, to accomplish which our fathers sacrificed so much, and which has been rendered sacred, as the nation thought, by the efforts of statesmen of all grades of intellect and every shade of political sentiment to preserve and protect, the Union is menaced with sacrilegious violence; and armies are marching on American soil to destroy our country; and our country's flag has been displaced on the battlements of a national fortress for the treasonable banner that flouts the southern breeze. To quiet this unholy Rebellion, to avenge this unendurable insult to our national flag, our people are rising as one man; and every man feels insulted by this insult to his country. Secession is not a remedy for evils, but is the sum of all evils; it is a heresy that must be drowned in blood; it cannot be reasoned down; and much as we all do and must regret it, there is but one of two things left us—we must crush it or it will crush us.

A few months after this address, in replying to the criticism of a personal and Democratic friend, he wrote:

The first principle of democracy has been, and is, devotion to our whole country and fidelity to the Constitution of the United States in every particular. Compared with this all other things are to be held as naught; and even the organization of the Democratic party—a party that has shown itself capable of administering the general government, because it has ever sympathized with the principles on which it is founded—should be cheerfully abandoned for the present, if that be necessary, to preserve intact the Government our fathers constructed for us. . . . We must say of whoever is for upholding the Constitution and preserving this union of states against open and secret enemies, he is my brother. We must look this war honestly in the face. We cannot protect ourselves and save our country with cunning tricks, nor

suppress this insurrection with a falsehood. We must strike home to the rebels; hit them on their tenderest spot.

Such utterances from Mr. Carpenter and many others of a similar import put him out of harmony with many of the leaders of his party, who met in August, 1862, and severely criticised the manner of conducting the war and issued what was known as the "Ryan Address." Mr. Carpenter at once wrote a review of that address, which was published throughout the entire north. That review called forth a letter of thanks from Secretary Stanton. A few days after, in September, 1862, Mr. Lincoln issued his Proclamation of Emancipation, and at a mass meeting held in Chicago to ratify the President's act, Mr. Carpenter said:

We need not necessarily discuss the propriety of, or necessity for, the President's proclamation. Upon that subject there is understood to have been difference of opinion in the cabinet, hesitation on the part of the President; and very likely we should find difference of opinion among the speakers and hearers to-night. But that is not the question. Wise or unwise, necessary or unnecessary, it has gone forth, and the only question now to be considered is, shall the Government be sustained in enforcing it? The ship of state is tossed by angry waves; our liberties, our national existence even, hang on the results of military operations, and the commander must take the responsibility of directing what shall and what shall not be done. He may not always do the wisest thing, but we have no hope but in executing, unitedly and without disputation, such plans as the President may devise. . . . The necessities of military success require subordination to one guiding mind, and any policy, even the worst, is preferable to no policy. We have drifted long enough, and our captain at

length indicates a port and orders us to make for it. It may not be the best that could have been selected; there may be shoals in our course, and breakers ahead, but it is certain that we must unite in our efforts to reach it, or go down in the engulfing flood. For one, I propose to go ashore; and afterward, when delivered from the tempest, we shall have long winter nights and soft summer days to discuss political questions and court-martial the captain, if he deserves it. I would support the measure, even though I thought it unwise, so long as it remains the military policy of the country. But I do not believe it unwise. . . . The rights of property and all other rights must give way, if necessary, before the war power; and this proclamation merely announces the future war policy of the Government. First, there is not the slightest doubt that it is the duty of the President to conduct the war to a successful end; if it be necessary to desolate the south, then let the south be desolated—the necessity is our justification. Second, the only remaining question is the necessity of the particular measure, and of that the President is for the present the sole judge. He says it is necessary. I believe it is. The slave is merely property to his master, and our northern objectors say, rather than weaken the south by depriving the rebels of their property, let us waste another million of true, loyal men, and a thousand millions in treasure.

In other meetings and especially one at Janesville, Mr. Carpenter, after careful study and preparation, and in a very able and masterly address, analyzed as a lawyer the constitutional powers of Congress to raise and support armies and navies, and the constitutional powers and duties of the President of the United States as the commander-in-chief of the armies and navies, to put down the Rebellion. No address upon constitutional questions ever made a more profound impression upon a popular assembly. Such ad-

dressess were repeated in different parts of this and other states. He was a promoter and active participant in the loyal Democratic convention, held at Janesville, September 17th, 1863, and attended by leading Democrats from different parts of the state. In obedience to his own logic—often repeated—he declined to support McClellan and Pendleton in 1864, on the ground that they were pledged to a platform that “Jeff. Davis would have written;” and declared, that “Lincoln has honestly been endeavoring to put down the Rebellion and should receive the hearty support of all men. If we believe the rebels right then is the war wrong. If the government was right in going into war, then is it right now. The people are pledged to the support of this government, not to the 4th of March next, but for ten generations—for all time.

On September 29th, 1865, a banquet was given at Janesville in honor of General William T. Sherman, who was an honored guest at the state fair. The nominees of both political parties in this state were present. Also United States Senators Doolittle and Howe and Postmaster-General Randall. Upon only a few hours’ notice Carpenter spoke to the sentiment—“The Loyal American People—always faithful to the Union.” His response consisted largely of a series of questions which would admit of only a single answer; and that in condemnation of the course then being pursued in the south by the administration of President Johnson at Washington. Almost every

sentence was received with vociferous cheers. Sherman said to Carpenter the next day that he had never before thought of the matter in the light he had thus presented it. In the conflict between Congress and the President, Doolittle and Randall supported the latter, and Howe was identified with the former. In September, 1866, Carpenter, at the request of personal friends, challenged Doolittle to a joint debate of the questions thus at issue, but he declined.

A few weeks afterwards, in compliance with a request signed by hundreds of citizens, Carpenter expressed his views, to a large and brilliant audience in Milwaukee, as to the principles on which the reconstruction acts were based.

From the time Fort Sumter was fired upon down to the autumn of 1867, Carpenter had refrained from discussing partisan politics or attending partisan conventions or meetings. On the contrary, in all his speeches and letters he had steadily adhered to what he regarded the paramount issue between the unionists and disunionists—or as he sometimes put it, between patriots and traitors. He was chosen and sent to be a delegate to the Union Republican state convention, which renominated Governor Fairchild, September 4th, 1867, and from that time on he became an avowed Republican. Up to the time he was forty-four years of age he had never held any office except that of district attorney of Rock County. His ready and sparkling wit, his agreeable manners, his good-natured and jolly exuberance, his brilliant and

captivating oratory and his convincing logic made it difficult for him to resist being elected to office or at least being nominated as a candidate for office. But he had a supreme ambition to become a great lawyer and hence all matters pertaining to office were to him subordinate. It appears that he declined a nomination for Congress as early as June, 1856. He declined a renomination for district attorney in October, 1856. He declined a nomination for state senator in October, 1857. He declined a nomination to be an independent union candidate for Congress in September, 1862. He declined a nomination for Congress in September, 1864. Upon numerous other occasions he was urged to become a candidate for office, but at each time he dismissed the matter with a remark which precluded further advances. After he became forty-four years of age a new temptation was presented. At the election in November, 1868, Grant had carried Wisconsin by a majority of 24,117; and both branches of the state Legislature were Republican. It was certain that a new man would be elected to the United States Senate in the place of James R. Doolittle, who had held the office for nearly twelve years. The majority of the party—especially the younger members—were enthusiastically in favor of Carpenter, whom they had learned to admire for his great ability and brilliancy, and to whom they felt indebted for his great services to the Union cause during the Rebellion and the dark days of the not yet fully completed

reconstruction. With Carpenter it was a serious question whether in his circumstances he ought to allow his extensive and established law business to be even partially frustrated by the duties of such an office. But having in mind the examples of Webster—who was his highest ideal of a constitutional lawyer, and his old tutor, Rufus Choate, whom he justly regarded with filial affection, he consented to be a candidate. But some of the older members of the party had plans of their own and did not take kindly to the election to that office of one whom they regarded as an intruder. The result was that upon the opening of the Legislature in January, 1869, there were four other candidates in the field. But it was only necessary that all the candidates should be seen and heard at a meeting called by the Republican members of the Legislature for that purpose, in order to determine their choice. The election of Carpenter soon followed and on the 4th of March, 1869, he took his seat in the Senate of the United States. His fame as a lawyer had gone before him, and he needed no introduction to that body. He was placed upon three of the most important standing committees—Judiciary, Patents, and Revision of the Laws of the United States—having for his associates such men as Trumbull, Thurman, Sumner, Conkling, Bayard, Ferry and Edmunds. Mr. Trumbull was his old associate in the McCardle case and against Mr. Edmunds he used to try cases before a justice of the peace when they were both studying law in Vermont.

There is no purpose here of reviewing his conduct as a senator. It may be said, however, that during his services in the senate he argued from the standpoint of a lawyer many legal questions, especially those having a constitutional bearing. Among such questions may be mentioned the tenure of office act and the power of removal; the payment of property destroyed in the Rebellion; the conditional readmission of Georgia; the relief of Fitz John Porter, and many other legal questions. The Act of March 3d, 1875, "to determine the jurisdiction of the Circuit Courts of the United States and to regulate the removal of causes from state courts and for other purposes," was written by him and known as "The Carpenter Act."

That his heart was in his profession is manifest from the fact that at midnight on the last day of his first term a package of photographs was placed in his hands with the request for his autograph. Thereupon he wrote on each, "Matt. H. Carpenter, Attorney at Law." Once, while in the cloak room of the Senate, reading the printed record in a case pending in court, a number of other senators were present discussing religion and the differences in the beliefs of churches. Finally one of them asked Carpenter to what church he belonged. He answered: "None;" but continued his reading. Soon after another asked him what church he would join if he were going to join any. He promptly answered: "The Catholic Church"—but continued his reading. Thereupon he was asked why he preferred the Catholic Church

to any other. He replied, that that Church believed in Purgatory, and that, as he understood, was equivalent to a chance for a new trial. His distinguished widow writes me:

I am so glad that Mr. Carpenter is to be presented as a lawyer, for his heart was in his profession.

Without going into the political causes which defeated his reelection to the United States Senate in the winter of 1875, it may be said that sixty of the eighty-one Republican members of the Legislature warmly supported him, and that he was unanimously nominated by the Republican caucus; but that sixteen Republicans refused to attend the caucus and joined with the fifty-two Democrats in defeating him and electing his successor. One of the excuses for such action was the fact that he had supported and voted for the bill increasing the compensation of members of Congress; and had boldly defended the act in a speech which was published throughout the country. Besides, he had incurred the enmity of some of the railroads. On returning home from his defeat, he received numerous ovations along the way; and after reaching Milwaukee he addressed an immense audience on the subject. The temper of his speech is well indicated by a few of the opening sentences:

We have met—not to sorrow and mourn—not to mingle our tears over defeat—nor yet to console disappointed candidates. . . . Let the dead past bury its dead. We live in the present. We live for the future. What is done is done. Let by-gones be by-gones—move on the column.

Senators Chandler of Michigan, Ramsey of Minnesota and others, met with similar fates by similar methods and for similar causes, during the same winter. Carpenter again became a candidate for the United States Senate in the winter of 1879—more for the purpose of being vindicated than from a desire to reënter that body. Two other candidates were in the field. After ninety-five ballots in the Republican caucus, Honorable E. W. Keyes, who had been the leading candidate, requested his supporters to withdraw his name and move the nomination of Carpenter by acclamation, which was done. Thereupon the name of the other candidate, Timothy O. Howe, the sitting member, was withdrawn; and Carpenter became the unanimous nominee of the party. He was then elected by a large majority over the combined vote of his two Democratic opponents, the leading one of whom was his old partner—Chief-Justice Edward G. Ryan.

No one complains that he did not faithfully attend to all his duties as a senator. Nevertheless, during his first term in the Senate he argued thirty-one cases in the Supreme Court of the United States, as will be found by an examination of the reports of Wallace from volumes 9 to 21, inclusive. Some of these cases were of great public importance, as, for instance, the Slaughter House Cases, which arose in New Orleans, and were finally made to turn on the construction and effect of the 14th Amendment.⁵

⁵ Wallace's Reports, 273, 16 *ibid*, 36.

During the remaining six years of his life he argued thirty-nine cases in the Supreme Court, making a grand total of ninety-two cases, comprised in thirty-six volumes of the reports, which he argued in that court during the short period of seventeen years.

During the four years between his two terms as senator he successfully defended President Grant's Secretary of War—William W. Belknap—on his being impeached before the Senate in 1876 for "high crimes and misdemeanors." During that trial there was a certain ruling against him. Subsequently he sought to have it changed; and for that purpose boldly urged upon what he claimed to be Scriptural authority, that Moses, on reargument, induced the Almighty to reconsider and reverse His former judgment. He had the honor of being selected by Honorable Samuel J. Tilden and his party friends to appear as their counsel before the Electoral Commission so far as the election in Louisiana was concerned.

To the mind of the lawyer, what has been said naturally suggests an immense amount of hard work and study not mentioned even in a general way—much less in detail. His last speech in the senate was made January 7th, 1881. His last days were spent mostly at home with his law books—working on various matters pertaining to his practice, and the senatorial questions in which he was interested. Possessed of a grand physique—giving promise of a long and useful life—yet he could not resist the malignant disease with which he was afflicted. He

died at the early age of fifty-six. To the end he was the same witty and joyous Matt. It is said that just before he died, he inquired of the attending physician the cause of the severe pain he was suffering. On being told that it was the stoppage of the colon he at once remarked: "Doctor, that is not a full stop, is it?"

Tributes to his character and memory as a senator, statesman and friend may be found in the records of Congress. A committee of both houses accompanied the body to Milwaukee. Here, in the presence of state officials, members of the Legislature and friends, his remains were delivered to "the great commonwealth he served so faithfully and loved so well," the Honorable Roscoe Conkling making the address.

Of course Mr. Carpenter had faults; but no one has ever intimated that he was wanting in professional integrity or honor. These qualities are conceded by all. What shall be said of him and his life work as a lawyer? Upon such a question the most convincing testimony is given by impartial witnesses who, from their own experience and from having seen and heard him in the trial and argument of causes were competent to judge. On his first appearance before the Supreme Court of the United States Mr. Justice Greer—who had long been a member of that court—inquired of Justice Miller:

Who is that Mr. Carpenter who has come down from your circuit? I want to know him, for I have heard nothing equal to his effort to-day since Mr. Webster was before us.

Chief-Justice Chase said of one of his early efforts:

We regard that boy as one of the very ablest jurists in the country. I am not the only justice on this bench who delights in his eloquence and in his reasoning.

Mr. Justice Miller speaking of the time when he first saw him in Milwaukee:

He was the peer of any man at the bar and the superior of most of them—even then—although he was quite a young man.

When Belknap asked Justice Miller whom he should engage as counsel on his impeachment trial, he replied: "Matt. Carpenter and Judge Black—the best lawyers in America." After Carpenter's death Justice Miller wrote:

He was a great lawyer. He was thoroughly versed in the learning of his profession, with a mind eminently adapted to seize and elucidate its principles.

Mr. Justice Field once wrote that Carpenter "was one of the most remarkable men who ever appeared before the Supreme Court of the United States." After his death Mr. Justice Bradley wrote:

I esteemed him one of the best advocates I ever knew. He was extremely happy in possessing the court at once with the pith and gist of his case, no matter how occult or complicated it might be. Although to always do this must have cost him an immense amount of labor and exact investigation, his address did not betray them except in the result, his manner and style having all the outward appearance of being perfectly off-hand and spontaneous. He was indeed a thoroughbred lawyer, and must have devoted himself in the early part of his studies very closely and

laboriously to the great classics of the law. It was a real pleasure to see him in any case; and whatever else came, we always knew we should have at least one strong beam of light poured upon the pending case before it was closed.

At the bar meeting in Washington on his death, Mr. Justice Davis, before whom Carpenter had tried many cases at the circuit as well as in the Supreme Court, said:

Carpenter was neither a statesman nor a politician. He was preeminently a lawyer, who may be said at a single bound to have leaped into the front rank of the profession which he loved and which he honored. . . . He had one of the best and clearest minds ever known in this country.

Jeremiah S. Black, who moved his admission to the bar of the Supreme Court of the United States, and was his opponent in the McCardle case and other cases, and finally the executor of his will, said of him:

His notions of professional ethics were pure and high-toned. He never acted upon motives of lucre or malice. He would take what might be called a bad case, because he thought that every man should have a fair trial; but he would use no falsehood to gain it; he was true to the court as well as to the client. He was the least mercenary of all lawyers; a large proportion of his business was done for nothing. . . . To what height his career might have reached if he had lived and kept his health another score of years can now be only a speculative question. . . . As it was, he distanced his contemporaries and became the peer of the greatest among those who had started long before him.

The bar of Wisconsin was equally emphatic in praise of Mr. Carpenter as a lawyer, and the same was sanctioned by Wisconsin's highest court.

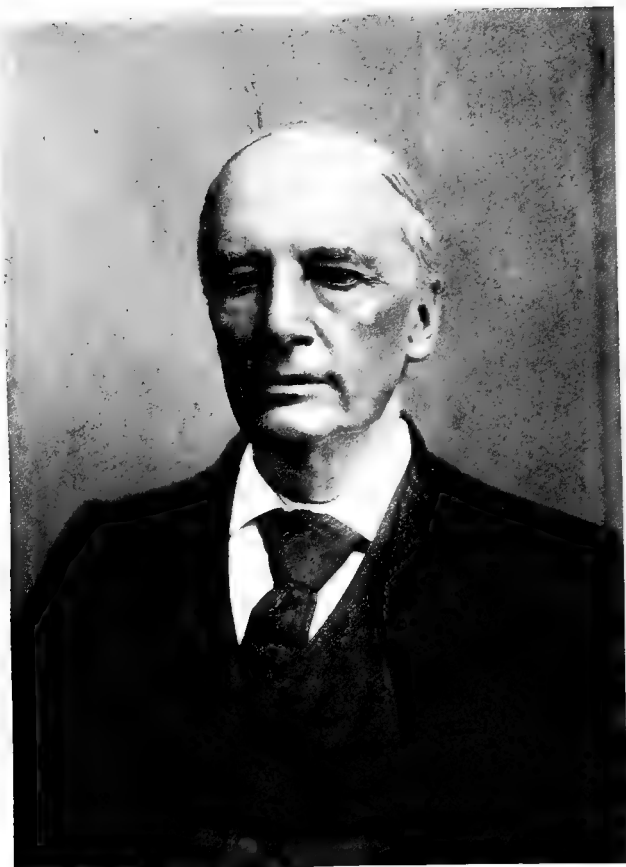
To become eminent at the English bar where the common law as modified by the acts of Parliament is the chief concern, is comparatively easy, as demonstrated by Mr. Benjamin of Louisiana after the close of the Civil War. But in a dual system of government like ours—with its divisions of power, its grants of power—its limitations of power—its prohibitions of power and its reservations of power, for one to become an eminent constitutional jurist is an achievement which but few have attained. Certainly there can be no higher praise of a lawyer than to be regarded by the American bar as one of the few. Matthew Hale Carpenter achieved that distinction.⁶

⁶The writer of this paper is indebted to the "Life of Matthew Hale Carpenter," by Franklin A. Fowler, published in 1883, and the letters and speeches therein contained.

ROBERT COMAN BRICKELL.

ROBERT COMAN BRICKELL

From a photograph taken when Judge Brickell was in his seventieth year.



ROBERT COMAN BRICKELL.

1824-1900.

BY

PETER JOSEPH HAMILTON,

of the Alabama Bar.

IT would seem as if some parts of the earth have features and qualities as marked as human beings. Rivers are differentiated from each other, and especially so are those rushing through a mountain country from those gently meandering amid cultivated fields. Thus the Tennessee River, made up of the Clinch, the Holston, the Watauga and other historic streams rising in the Appalachian Range in the western part of Virginia, passes through the wild Cherokee country, on the borders of what has become Tennessee and the Carolinas, while below Chattanooga, instead of a series of gorges we find the smiling Tennessee Valley of North Alabama.

In the 18th century the states on the Atlantic were outgrowing their old tidewater limits. The Scotch-Irish, migrating southwardly from Pennsylvania through the Appalachian highlands, reached the Shenandoah, and settling on these mountain waters founded the Watauga Association, the mother of

Tennessee, and, breaking through Cumberland Gap, they built the new commonwealth of Kentucky. In even earlier times the Tennessee River had been important as the highway by which the Cherokees and Chickasaws warred or visited, and by which the French and Spanish from New Orleans and Mobile influenced the Indians in the rear of the English Atlantic colonies. In the next century, after the Indians had yielded to the growing republic, the river was a passageway in the reverse movement by which the Americans occupied the southwest. Virginians and Carolinians continued to cross the stream towards Kentucky and Tennessee, but Virginians, Carolinians and Georgians, too, floated with its stream toward the new Mississippi Territory.

The valley region was fertile and produced cereals and cotton with equal facility. Not only was there the river, in its middle course broken picturesquely into many streams at Muscle Shoals, but everywhere on the shores of these southern Appalachian foothills were springs, many in number and some remarkable in size, making glad the land. The states whence the immigrants came were sending out men of their best blood to seek new homes. The Atlantic tobacco lands were becoming exhausted and the growing industry of cotton raising, especially since the multiplication of Whitney's cotton gins, ever beckoned increasing numbers westward. Professional men came as well as mechanics and farmers, and the new southwest was gradually settled, able

to claim a high order of civilization transferred bodily from older to newer and perhaps more inviting fields. Settlers on the Alabama River came more largely from Georgia, those on the Tombigbee from Tennessee, Virginia and the Carolinas by way of the Tennessee Valley, and the two streams of immigration united to develop the great cotton belt, with its outlet at the old French city of Mobile. The Tennessee Valley, however, had received the earliest and best immigrants, and grew up with less of slavery and perhaps more of general culture than the country nearer the Gulf. The Valley from the first had its distinctive character, and this remains even until now, despite the new mining and manufacturing interests to the south. The Tennessee River gave means of intercourse between its parts, while communication with the rest of the country was over mountains or through rocky valleys; and thus the northern basin not only remained homogeneous but somewhat separate from the rest of the state. It gave freely of its influence and population to the development of Alabama, but received back little in return.

The Tennessee Valley was a part of Mississippi Territory organized in 1798, which in 1817 broke into two halves, the western forming the state of Mississippi; the eastern, the territory of Alabama, itself to become a state two years later. It was the time when everybody came from somewhere else. Except the Indians in the interior and the Latins about Mo-

bile, which was itself annexed only in 1813, there were no natives in Alabama. Many, with the restlessness peculiar to Americans, were coming in from Tennessee, itself a new state, and others down the Tennessee River or by the roads parallel with it from the back country of Virginia, the Carolinas and even Georgia. Among those from North Carolina was Richard Benjamin Brickell, who was born at Raleigh, of a Welsh family that came to Carolina by way of Ireland. Another immigrating family from North Carolina were the Comans, originally from Ireland also.

The capital of the territory and state of Alabama was itself migratory, beginning with St. Stephens, on the Tombigbee, not far above the Bay of Mobile. The constitutional convention was held at Huntsville in 1819, while the first state capital was at Cahawba on the Alabama River, in what was to become the heart of the cotton belt. To St. Stephens came Brickell as a printer, and he with a Mr. Allen became the state printers and published the first volume of Alabama Acts. He removed to Huntsville in 1822. In the next year he married Margaret W. Coman, and from 1826 they made their home at Athens, where Brickell edited the *Weekly Athenian*. While living there he was for a time a member of the legislature, attending sessions at Tuscaloosa, whither the capital had been removed when Cahawba proved to be an unhealthful location.

Richard B. Brickell and Margaret, his wife, had

six children, one of whom was Robert Coman Brickell. The boy was born April 4th, 1824, in the home of his great-grandmother in Tuscumbia, at the western end of the Tennessee Valley in which most of his life was to be spent. He was shy and retiring, bright and attractive, and from an early day fond of books. Printing has been called the art preservative of all arts, and it can also claim at least two of the results named by Lord Bacon when he said that "reading maketh a full man, speaking a ready man, and writing an exact man;" for it is reading and writing in one. Certain it is that the boy growing up in his father's printing shop learned to be both a full, ready and accurate thinker, and in time became equally apt in oral expression. Here it was that he gradually became master of that fine vocabulary which never failed him either in speaking or writing. Although his health was good, he was not of a robust physique, and this deprived him somewhat of association with boys, who as a rule are nothing if not rough, and threw him back upon himself and those friends that never fail us,—the books of the masters. And he had friends at Athens, such as Pettus and Houston, who were to be his friends for life. When he began work a little incident betrayed the gentleness and love of his nature. In after life he once told how he invested his first week's earnings, amounting to thirteen dollars, towards the purchase one Saturday night of a silk dress for his mother, whose means knew little of the luxuries of life. It

may not have been fine silk, but it was fine thoughtfulness, and we doubt whether material of whatever higher grade would have meant so much to the mother's heart. Pieces of that silk were treasured for half a century.

Young Brickell was educated at Athens and read law under Daniel Coleman, judge of the Circuit Court and afterwards associate-justice of the Supreme Court. At the early age of nineteen, he was admitted to the bar and commenced the practice of law. This in the new state, and in particular in the Tennessee Valley, was in the nature of following the circuit, and in this way the young man came to know his native valley well, and to be known of it. He moved to Huntsville in 1851, where he formed a partnership with S. D. Cabaniss, and three years later Leroy Pope Walker, the distinguished son of the senator, became a member of the firm. Mr. Cabaniss later withdrew, but the firm of Walker and Brickell continued the practice of law for almost twenty years. Walker's love of forensic contest gave Brickell the only excuse he needed for devoting himself to the studies of the office rather than the contests of courts. And yet he bore his full share of the burdens of the increasing business. In arguing a case he was ready and logical, and had a fiery earnestness which one would not expect of the retiring student. He became master of his subject and then it seemed to master him, until he not less than his audience was borne resistlessly along. It need not

be contended that he was among the greatest of orators; but from the beginning he gave the promise of being among the greatest of lawyers.

In politics he was a States' Rights Democrat of perhaps the extreme school, but could never have uttered the expression of his partner, who in an early War speech said that "he expected to call the roll of his slaves from the foot of Bunker Hill monument." The people of the Tennessee Valley and the adjacent high country were more conservative, as a rule, than those of the Alabama-Tombigbee basin, and contained some Union men. The valley gave much of its best blood to the Confederate army, and was overrun in later years by both combatants. Brickell never entered the army, as he was never physically robust, but he equipped his two brothers, and they fought gallantly until the close of the war. Twice, however, while the Federal troops were in possession of Huntsville, he was arrested and imprisoned because of his well-known aid to the Confederate cause. After the close of hostilities, when the Alabama state government was set up, Brickell took no large part in affairs. He did his duty as a private citizen, but with his natural timidity shrank from public leadership. In point of fact, however, the struggle of the south was useless. The north had made up its mind that the negro should be given political equality with the whites. The restored governments were soon overturned, the south put under military rule, and an electorate forcibly cre-

ated in which the negroes were given the ballot and leading ex-Confederates disfranchised.

In the course of Brickell's practice he defended before the United States Courts people arrested for alleged Ku Klux outrages. On one occasion, about 1872, David P. Lewis was prosecuting such a case before Richard Busteed, the United States District Judge whose name has become a synonym throughout the south for arbitrary rulings. There was little evidence against Brickell's clients, two men named Sheldon from Blount County, and all they were certainly shown to have done was only to call off men who were attempting to break up a camp meeting. Under Busteed's charge, however, the jury had to convict, and the Sheldons were fined and sentenced to a long term in the penitentiary at Albany. Brickell was very indignant and, with a friend called on Busteed. With a voice of mastered suppression, but with pale countenance and gleaming eyes, Brickell charged the judge to his face with prostitution of his office to practice grievous wrong upon helpless and guiltless men. He said that Busteed had degraded himself as a man, and degraded the ermine he wore as a minister of justice. He then turned on his heel and left the astounded judge. Afterwards upon advice from lawyers that this unprofessional language would do more harm than good, Brickell consented to withdraw what he had said; but at least it had impressed Busteed. The judge changed the sentence and in a short time the Sheldons were re-

leased. Busteed took no personal revenge, and it was characteristic of him that he used to relate the incident and copy the language and manner of Brickell as illustrating to his mind the finest piece of invective he had ever heard.

An amusing instance of the regard in which Brickell was held in his native valley, as well as of his only defect,—unsystem, if we may coin a word,—is found in a story often told of this period of his life.

He frequently attended court at Guntersville, where he had many friends. Soon after the close of the war a man from the north had some business in that court, and afterwards gave the following account of his brief sojourn there. Guntersville at that time was accessible only by water, the boats plying irregularly between there and Whitesburg, the landing for Huntsville. This stranger, according to his own account, arrived at the hotel at night, and next morning entered the dining room and ordered breakfast. The landlady promptly appeared on the scene and said that "breakfast could not be served until Mr. Brickell was ready." He thereupon waited with what patience he could command until he saw a quiet, modest looking man leisurely enter. Immediately the waiters bestirred themselves and a good hot, southern breakfast was served at once. Having been delayed at breakfast, the visitor hurried to the court room, but saw no signs of court being in session. Upon inquiring when it would open, he was told that the "Judge always waited until Mr. Brickell was

ready." He finally arranged his matters and passed the day as best he could, determined, however, to leave the place at the earliest hour possible. The boat was advertised to leave at a certain time in the afternoon, and, fearing to be left in a place where one man seemed to dominate everything, he was promptly at the landing and got on board. Long after the hour appointed for departure, however, the boat still remained motionless. He could discover no preparation for leaving. Upon inquiring the cause of the delay he received what he began to consider a stereotyped reply,—“The boat awaits Mr. Brickell’s convenience for leaving!”

During the unquiet Reconstruction years Brickell pursued the practice of law as well as the unsettled condition of courts admitted, and also undertook a work which was to be monumental. There was no satisfactory digest at the time of the reports of the Supreme Court of Alabama, although the printed volumes numbered sixty-odd and contained many valuable decisions. It was suggested to him that he make a digest, and in 1869 he began his labors. In the course of three years he had read and digested the reports sufficiently to put forth a bulky volume of 990 pages, exclusive of tables of cases, embracing the titles from A to E inclusive. He says in the preface that he had had no assistance from any quarter, so that whatever praise or blame might attach was his alone. Characteristically he dedicated the important book, not to any one who could aid him in law

or politics, not to any friend who could still do him a kindness, but to the memory of two distinguished but deceased members of the North Alabama bar, in "grateful remembrance of many kindnesses bestowed on the compiler in the early days of his professional life." The second and concluding volume was published in 1874 and contained 549 pages, besides tables and a short introduction on the judicial history of the state. In the first volume he had promised biographical sketches of the judges, but from the difficulty of obtaining some he gave up the plan of presenting any. This introduction, however, is the best, almost the only sketch of the judicial evolution of Alabama.

The book shows both the strength and the weakness of the man. The first volume is, perhaps, over-elaborated and the second, perhaps, under-elaborated. There is a lack of subdivision in the first volume, much being grouped under the generic heads of criminal law, evidence, executors, etc. In the second, there are more titles, but they are less developed, although substantially the whole field is more or less considered. If one will take up a modern digest, for instance, one of the West Publishing Company, he will find that A to E will embrace much less than half of the law titles and from F on will, on the other hand, contain much more than half. Brickell evidently spent much more time upon his first volume than upon the second, and this was partly due to his lack of system. What he did, he did with all his

mind and all his strength, but in finishing a large undertaking he permitted himself to be called off by other duties. The digest as published, covers the early volumes, which in Alabama, as in other states, bore the names of the reporters, and the first forty-three of the new series of Alabama Reports. Judge Stone used to say, with perhaps a little malice, that Brickell unquestionably had a system in the arrangement of his digests, but that no one except Brickell knew what it was.

There was, however, a special reason why he could not give as much time to the second volume as to the first. Politics ran high, and under the Reconstruction laws, although Alabama had distinctly rejected the constitution prepared for her by a radical convention, it was nevertheless forced on her. Congress declared it adopted, and an era of political disorder was ushered in. At first the whites retained the government and there was a Democratic administration, and then followed a Republican, in which were many negroes. North Alabama then, as before, retained her prominent place in politics. From there in 1872 came David P. Lewis, a member of the newly-formed Republican party, who by the Democratic legislature was regretfully counted in as governor; from Limestone, too, was to come Geo. S. Houston, an intimate friend of Brickell, and the successful Democratic candidate for governor at the next election.

The Supreme Court of Alabama before the Civil War had always maintained a high rank. Of course

during the civil struggle there was a smaller volume of litigation and the questions related mainly to war subjects. During that time A. J. Walker was chief-justice, Geo. W. Stone and R. W. Walker associates, and there came no change with the close of hostilities except that John D. Phelan succeeded Stone. In 1866 William M. Byrd and Thomas J. Judge, eminent lawyers, became the associates and so continued until Reconstruction affected the bench as well as the legislative and executive departments. Then from the January term 1869, E. Woolsey Peck was chief-justice, and Thomas M. Peters and Benjamin F. Saffold associates.

The Chief-Justice was a man of great ability, but during this period judges took extreme positions as to all political issues and questions arising from the Civil War. Lincoln had perhaps been inclined to recognize to some extent the war governments, but President Johnson swept them away, and constitutional amendments not less than congressional enactments vetoed in vain, had now branded them as treasonable and their acts as void. The southern Supreme Courts, and that of Alabama amongst them, followed up this line of policy even as to private transactions. Distress and uncertainty reigned. Such was the situation when in 1873 the retirement of Chief-Justice Peck, the strongest man on the bench, gave an opportunity for the appointment of another judge.

Governor Lewis was a strong Republican, but

he had grown up with Brickell and used the opportunity to make the friend he admired a justice of the Supreme Court. Robert C. Brickell, therefore, in June, 1873 became a member of the supreme bench of Alabama when Peters was promoted to the post of chief-justice. The earliest of Brickell's decisions is *Diggs vs. State*,¹ the first case reported of the June term. So modest and unassuming had been Brickell's life up to that time that he was hardly known outside of his native valley; but this was all to be changed. He grew to fit his new place and instinctively adjusted himself to his wider duties. He later used to say that some lawyers tied up several volumes of Alabama Reports from 1868 on as *obiter dicta*; but at all events this ceased with 1873. His influence upon the bench was soon observed and the decisions gradually became of value.

In the next year there came the redemption of the whole government from Reconstruction misrule,—a period worse than war,—and the members of the dominant white, or Democratic party, were put in office throughout the state from Governor Houston down. The lawyers were so satisfied with Brickell's conduct on the bench that they had secured his nomination, and he with Thomas J. Judge and Amos R. Manning was triumphantly elected. The other two united to elect him chief-justice of the new Court. Old as the state then was, Brickell was the first native chief-justice. The term was for six years and in

¹ 49 Alabama Reports, 311.

1880, under the constitution of 1875 making the position a distinct office, he was reelected chief-justice without opposition. His associates were Geo. W. Stone and Henderson R. Somerville, Stone having been on the bench since the death of Judge in 1875. Thus chief-justice he remained for ten years, his last opinion being in the 75th volume of Alabama Reports, and during this time he, with his able associates, fully restored the decisions of the court to their former standard. He was a bachelor and lived in the capitol, giving almost all his time to judicial business. Thoroughly steeped in law, he applied his great learning to the cases presented. His memory was extraordinary, extending without hesitation even to names of cases and volumes and pages of reports. His method of work was not systematic. He would sometimes delay taking up business, but when he got into a case it was difficult to make him pause for any purpose. His written style was full and flowing, his citations showing a vast range of study and his reasoning convincing. A decision by Judge Brickell commands respect in any quarter of the United States. His opinions have been generally regarded as masterpieces of forensic argument.

Brickell's practice had familiarized him with northern Alabama. His removal to Montgomery merely broadened his field, and he was fully equal to it. He took the position of associate-justice in the state house where Jefferson Davis had been inaugurated, the Confederate provisional Congress had sat,

when Reconstruction and negro suffrage were accomplished facts. He accepted the results of the war and gave his talents to the works of peace. Cotton and manufacturing in the interior, commerce and shipping at Mobile, were now reinforced by a remarkable development of the mountain country which had separated his native home from the agricultural basin of the state. Birmingham and other cities, with mining and iron industries, were springing up as if by magic and transforming northern Alabama. Transportation interests were extending and growing with undreamed of rapidity. Litigation from all quarters was of a variety and volume which had never been seen in the palmiest days of the Supreme Court. Yet Brickell proved himself equal to his new position as he had to that of a circuit rider and law digester in the Tennessee Valley, and became a justice ranking with the foremost.

The status in constitutional law of the late Confederate states was a problem difficult to decide without the infusion and confusion of political feeling. It was one which taxed the Supreme Court of the United States under Chief-Justice Chase and his able associates. It went farther than merely the nature of the Confederacy as such. That had disappeared, although it left some property and more consequences behind it for adjustment. More serious for the people generally was the status of the respective state governments during the war, and of transactions in Confederate money and securities when

there was no other circulating medium, and no other government. The decisions of the Alabama Reconstruction court held the Confederacy to be an insurrectionary and illegal combination, not even *de facto*, all of whose acts and officers were nullities. New trials could be granted on the theory that those by rebel courts were void, and Chancery courts could review rebel judgments. Even the acts of notaries were void. The Alabama court went farther and declared that the state government after secession was insurgent and did not amount even to a government *de facto*.

Brickell shortly after going on the bench felt himself compelled to follow the decision of the United States Supreme Court in *Hanauer vs. Doane*,² and decided that an action would not lie to recover the price of goods knowingly sold during the war for the manufacture of uniforms and clothing for soldiers in the Confederate service, although in so doing he had to overrule prior Alabama decisions. Afterwards, however, in *Riddle vs. Hill*,³ the Chief-Justice "reluctantly concurring" in the result but not in the reasoning, Brickell following a later decision of the United States Supreme Court, *Horn vs. Lockhart*,⁴ was able to hold that Alabama had a government *de facto*; that judicial decisions during the war which did not directly impair the supremacy of the Union

² 12 Wallace's Reports, 342.

³ 51 Alabama Reports, 224.

⁴ 17 Wallace's Reports, 570.

were to be treated as binding. This case settled also that the word "dollar" could be explained by parol and shown to mean not United States but Confederate money. In subsequent cases he went even farther and established the rule that the Alabama war government was not only *de facto* but *de jure*, a continuation of the old established administration, and that all of its acts, legislative, executive and judicial, not expressly violating the United States Constitution were fully valid. It was Judge Manning who rendered the initial opinions, but it was Brickell's influence which established and made them so far-reaching.

This principle entirely changed the legal view of business affairs during the war and led to the conclusion that private transactions in Confederate money were valid. Confederate money having passed out of existence, however, it was necessary to provide for the payment of debts contracted in that currency by ascertaining the value of the money at the time of the particular transactions. This was done by finding the gold value at the time of the transaction and at the time of the judicial decision and interpreting the one in terms of the other.

The results of this wise line of decisions can hardly be overestimated. They tended to remove domestic affairs of war times from the influence of political and civil dissension, and put them on the basis of international law. Brickell substituted law for sectional politics.

A court has to pass upon all matters coming before it, whether they be of practice or of substantive law, whether of transitory or permanent interest. A judge has often to devote great talents to a question which after a few years may have no value, or he may devote patient days and nights to elucidate facts of no importance to others than litigants. It is therefore with some hesitation that *Short vs. Battle*⁵ is cited as one of the great opinions of Judge Brickell; and yet it shows clearly how judicial independence and conservatism may be united in one mind. The Alabama married woman's law of 1848, modified only slightly by the later Code, provided that all property of a married woman should be controlled by the husband in a certain manner. The decisions construing this held that the law did not apply to property acquired under an instrument giving to the wife other rights and powers. Such an estate would be her equitable estate, with qualities declared by the creating instrument. The statute, therefore, covered everything which was not covered by the expressed will of the grantor. After the Civil War the Reconstruction court in its desire for uniformity held the law applicable to all property of the wife, whence and however acquired. The question came up for revision at the June term 1875, and the opinion in *Short vs. Battle* by Chief-Justice Brickell overruled the later decisions and restored those rendered prior to the war. The reasoning was cogent,

⁵ 52 Alabama Reports, 456.

the language flowing, and, despite the fact that a later statute, prepared by Brickell himself, has now abolished the whole married woman's system of that day, nevertheless a lawyer cannot without pleasure as well as profit read this excellent historical summary tracing the common law through all its various modifications.

While Brickell was on the bench not a few political questions came before the court. One of the most interesting was the contest between Reid and Moulton for the mayoralty of Mobile.⁶ On the face of the returns Reid, the Democratic candidate, was successful, but Moulton filed a bill in Chancery to enjoin him from assuming office and asked the court to do complete equity by a recount of the ballots, claiming that the procedure on a contested election defined in the city charter was an inadequate remedy. Moulton was successful below on Reid's motions to dissolve the injunction for want of equity and on the denials of the answer, and the Supreme Court also by Chief-Justice Peck sustained his contention. Brickell, however, filed a strong dissenting opinion, maintaining that a Chancery Court had no such jurisdiction and fortifying his views by numerous well-considered American cases. Although he was at the time unsuccessful, when he became chief-justice a year later he had the pleasure in *Moulton vs. Reid*,⁷ when the case came up on the merits, of

⁶ 51 Alabama Reports, 255.

⁷ 54 Alabama Reports, 320.

overruling the previous decision, and making his own views the law for the future.

A few other decisions may be mentioned. In defining the law as to municipal powers and the issue of municipal bonds, his decisions of *Dunn vs. New Orleans Railroad Co.*,⁸ when he was associate-justice, and *Wetumpka vs. Wetumpka Wharf Co.*,⁹ deserve high rank. Another, since much cited, is *Railroad vs. Hanlon*,¹⁰ determining that to an infant of tender age cannot be attributed the contributory negligence of his father. The case has been followed by the House of Lords. Perhaps his longest opinion, of twenty-nine pages, and one which he considered his best, was the dissenting opinion in *Ex parte Hardy*,¹¹ In that case the question arose whether the constitutional provision against imprisonment for debt applied to a party condemned by the Chancery Court for contempt in not paying over money. Brickell held that this was not prohibited and that the writ of *habeas corpus* could not reach such a case. The case is often cited, his dissenting opinion being more often adopted than the judgment of the court. One of the most valuable of his opinions, well and fully reasoned out, was that of *Goodman vs. Winter*,¹² discussing the powers of the Chancery Court over the property of minors. It holds that in Alabama, un-

⁸ 51 Alabama Reports, 128.

⁹ 63 Alabama Reports, 611.

¹⁰ 53 Alabama Reports, 70.

¹¹ 68 Alabama Reports, 303.

¹² 64 Alabama Reports, 410.

like the English jurisdictions, this power over wards of the court extends even to the sale of their real estate wherever it appears to be to the advantage of the minor. It is justly regarded as a leading case. One of his best opinions also is that of the Supreme Commandery vs. Ainsworth,¹³ construing a mutual life insurance contract. Its reasoning was adopted and quoted at length by the Supreme Court of the United States in *Ritter vs. Mutual Life*.¹⁴

He retired from the bench in 1884. This action on his part was due perhaps to a lack of harmony with his two associates in respect to methods of work. He resumed the practice of law at Huntsville with success and repeatedly argued cases before the court of which he had been a distinguished member, often having occasion in his modest way to cite opinions of his own. He continued his interest in the general subject of law and wrote and secured a passage of the married woman's act of 1885, which placed men and women on terms of practical equality as to property and contract. But during his retirement perhaps his greatest title to note was his labor as commissioner to draft the Code of Alabama of 1886. As his assistants he selected John P. Tillman of Birmingham and Peter Hamilton of Mobile, and in this manner it was that the writer in assisting his own father saw much of Judge Brickell and labored with him for a season at Huntsville and Montgomery.

¹³ 71 Alabama Reports 436.

¹⁴ 169 United States Reports, 139.

The subjects had long before been divided among the commissioners and the work of the joint sessions at Huntsville was in the way of revision of what had been prepared. Judge Brickell devoted his attention especially to the political part of the Code and amongst other titles supervised corporations, pleading, practice, and evidence.

The commissioners would assemble in Judge Brickell's back office not later than eight o'clock in the morning, work on different parts of the Code until noon, when an hour would be taken for dinner, afterwards work until supper in the same way, and then continue their labor until eleven o'clock at night or later. One could not but remark the unsystematic way in which the judge worked and yet wonder at the vast amount accomplished when he got at it. There seemed to be no limit to his powers of work. His wonderful memory was never more useful. He could remember the purport of cases on hearing the names. On one occasion seven cases were given under a section of the Code and when surprise was expressed when he fully discussed five without referring to the reports, his only comment was that he was ashamed that two were not distinct in his mind. He always had time to receive callers, many of them distinguished men, but sooner or later turned the conversation to the improvement of the laws. Urbanity and persuasiveness surely never existed to a greater degree, and his earnest and yet gentle manner could not fail to captivate. He seemed utterly unconscious

of his own greatness, and loved, and was loved by, those who knew him as seldom falls to the lot of man.

After the close of his labors on the Code, he undertook to bring down his digest to date and did much work in this direction. He did not fulfill his time arrangement with the publishers, however, and was compelled to call in outside assistance. Nevertheless he carefully supervised everything, and the third volume, covering 44 to 76 Alabama Reports, is not an unworthy companion of the other two. Indeed it is more evenly written and its subdivision more systematic. The whole is for practical purposes, of course, superseded by more recent publications, but the foundation of all, past, present and to come, must be the lucid expositions in his work.

An amusing instance of his timidity was afforded not long before the expiration of his first term as chief-justice. He was invited by a graduating law class of the State University to deliver an address before them at commencement. It required some persuasion to make him accept, and even then the knowing ones shook their heads. However, the boys were priding themselves upon having secured the Chief-Justice in a capacity in which he had never before acted. When the day arrived, what was their surprise to receive a telegram from Judge Brickell that he had lost his manuscript and would not be able to deliver the lecture. Older heads, however, declared that, if he had lost it, it was on purpose. At all events his place had to be supplied by *ex tem-*

pore efforts of lesser lights who happened to be present.

The number of cases in whose decisions he participated during his long career may be counted by the thousands, and those in which he rendered full opinions himself are upwards of sixteen hundred. He did not passively acquiesce in the work of others, and did not hesitate to differ and write elaborate and forcible dissenting opinions when he deemed it necessary. During his term as associate-justice he delivered ninety opinions, of which six were dissenting, and ten per cent of his opinions during this time were over nine printed pages in length. During his first incumbency as chief-justice, embracing ten years, he personally wrote and delivered eleven hundred and sixty-five opinions, of which twelve per cent exceeded nine printed pages in length. His influence over the court was such that he had less occasion for dissenting and of these opinions only one per cent are of that nature. We may note here for better comparison that during his second incumbency as chief-justice, lasting four years, and yet to be related, he wrote three hundred and forty-nine opinions, of which about twenty-two per cent exceeded nine pages, and nine, hardly three per cent, were dissentient.

Judge Brickell had not a commanding appearance. He was not large and, towards the end of his life, he stooped somewhat. In manner he was quiet, but intent in conversation, spoke distinctly, but slowly,

almost with a drawl. His face could not be called handsome and yet was very attractive, his features regular and rounded, and his gray eyes kindness itself. He did not laugh loudly, but it was a whole-souled laugh that put one at his ease. On the bench he was an ideal judge, following the argument closely, never interrupting with careless questions, although always keeping the speaker and the court to the business in hand. Questions raised he decided promptly, conferring with his colleagues when necessary, but generally finding this formality needless. To young lawyers his manner was all that could be asked, although it is recorded that on the occasion of the first appearance of one gentleman, since well known, Judge Brickell unintentionally embarrassed him greatly. The argument for the appellant had to the mind of the court answered itself, and the Chief-Justice, using the customary formula, said to the appellee's counsel as he rose to speak that the court did not care to hear from him. Such an utterance was new to the counsel, and caused him to retire in confusion, wondering in what way he had incurred the displeasure of the court.

Judge Brickell always considered Huntsville his home, but in 1890 he moved to Montgomery and formed a law partnership with Semple and Gunter. This did not continue long, for in March, 1894, on the death of Chief-Justice Stone, he was reappointed chief-justice by Governor Jones. To this there was no opposition from any quarter, for, as he envied and

injured no one, so all were glad at any good fortune occurring to him. His fitness for the post was universally recognized by the people in every part of the state.

The flexibility of his mind and the range of subjects decided was never better shown than in his decisions during this second incumbency as chief-justice. At the same time it would be difficult to put the finger on cases deciding new principles. It generally happens in the course of legal development that the leading cases are in the earlier and developing period of the state. During the later time of expansion, the courts are largely guided by decisions already made, by application of old principles to new facts. The industry of Judge Brickell was fully as great as before,—perhaps his opinions on the average were longer. His mind was such as to require full consideration of each case presented rather than attempt to clear the docket by prompt but slipshod decisions.

An example of the range of his labors may be instanced in the *First National Bank of Birmingham vs. the First National Bank of Newport*,¹⁵ discussing the powers of banks and their correspondents, particularly as to collateral, and the first case in the same volume, *Alabama National Bank vs. Rivers*, treats quite exhaustively of some phases of indorsement of negotiable paper. Construction of municipal contracts was illustrated in *Brush Electric Company vs.*

¹⁵ 116 Alabama Reports, 520.

Montgomery,¹⁶ where a long opinion discusses an intricate contract and its breach. The Chief-Justice also did his full share, as previously, in the decision of criminal cases, these being in Alabama preferred matters on the docket; but criminal law had been settled at an early date, and the principal points now passed on related to admissibility of evidence and the like. As a case of local and some constitutional interest may be cited *State vs. Sayre*,¹⁷ as to whether or not a vacancy existed in a judgeship. It would, therefore, be misleading to think of Brickell as mainly an equity jurist, and yet it is in that connection probably that he will be best remembered. One Chancery case of interest was *Lindsay vs. United States Savings Co.*,¹⁸ relating to usury in building and loan contracts. The leading case in Alabama, *Falls vs. United States Savings Company*,¹⁹ had been decided in the interval when Brickell was off the bench, and was the beginning of a line of decisions which put Alabama, like a number of other states, in opposition to the Federal courts on this subject. The state courts looking to the protection of their citizens, considered the substance of the transaction as a loan of money and were inclined to consider premiums and the like as a cloak for usury; the Federal judiciary, on the other hand, looked to the form of the transaction and held that the borrower was a member

¹⁶ 114 Alabama Reports, 433.

¹⁷ 118 Alabama Reports, 1.

¹⁸ 120 Alabama Reports, 156.

¹⁹ 97 Alabama Reports, 417.

of the lending association and thus to a large extent estopped from attacking its policy. Brickell followed the Falls case on the principle of *stare decisis*, but delivered an interesting opinion in the Lindsay case, declaring unconstitutional a legislative attempt to undo the principle of the Falls decision by establishing a new method for the interpretation of building and loan contracts.

He presided with the same dignity and the same qualities as before, until in November, 1898, he retired from office, declining to be a candidate for re-election. He resumed the practice of law at his old home in Huntsville. Although the infirmities of age began to show themselves, he continued to live the life of a student, appearing in court when practicable, always the gentle friend and counselor as of old.

Brickell had been in the midst of politics from his boyhood, for there was no part of the state in which politics ran higher than in the Tennessee Valley. Whigs and Democrats before the war had famous contests there. During the war there were a few northern sympathizers, and some of these afterwards became Republicans. Close intercourse between the different parts of the Valley, however, led its men to understand each other better and this led to mutual respect. There was not the same bitterness between parties as in other parts of the state. Thus Governor Lewis and Judge Brickell were warm friends, as we have seen. On Brickell's removal to Montgomery, on the other hand, he found himself in a different at-

mosphere. There all sections of the state were represented, but the dominant power was that of the Black Belt. North Alabama had furnished many prominent men, and was still to do so; but the section which controlled the policy of the state as a whole had generally been the Alabama-Tombigbee basin, with its plantation interests. This was a different country in many ways from that to which Brickell had been used. It was not only separated from North Alabama by a mountain region, but was also differentiated from the commercial interests which found their center in Mobile, Alabama's seaport. The Black Belt even more than before the war, ruled state politics. During the Reconstruction era its sway was a rule of iron. It felt the horrors of Reconstruction more than any other section, for the negroes were in larger numbers and in some counties outnumbered the whites. The establishment of universal suffrage evoked political organization and schemes of a more drastic nature than in other parts of the state, and for this reason the grip of managers was firmer than elsewhere. Brickell had taken little personal interest in the politics of his native section, because of his natural disinclination to strife and discord. Even less was he drawn into the larger contests centering about Montgomery; and yet it was remarkable how this man commanded the respect and gradually the veneration of all sections. He was regarded as one who needed no political strength because he was above politics. All united to do him honor.

If one should take the history of the English bar he will not find a judge becoming eminent except at London. This, of course, is due in a large measure to the concentration at the capital in one form or another of all the higher courts. In American history perhaps it is the usual process to promote to the Federal bench state judges or lawyers of eminence, but these lawyers generally have already attained a more or less national practice or reputation. The result is that the Supreme Court becomes representative in character. Judge Brickell, on the other hand, is an instance of a judge becoming eminent in a state and influencing other states and other tribunals only from greatness in his own local tribunal. Indeed, in some respects his surroundings might be called provincial, for he was essentially of the Tennessee Valley even more than he was Alabamian. Not only did he have the characteristic of his native valley and state, but of the south, that portion of the country which has been the most conservative. Before the war and for years after that struggle, owing in one way or other to the "peculiar institution," as it used to be called, and the resulting presence of the freedmen, the south had been outside the current of immigration and the broad national development, characteristic of the north and west. And therefore Brickell was a most interesting instance of how a man can be local or provincial in his surroundings and tastes and yet in influence rise superior to them all.

* Brickell, as I have pointed out, had little to do with politics, that feature of our life which especially differentiated the south from the rest of the country, but he had a great deal to do with law and literature. He was a born lawyer, with a heart and brain attuned to jurisprudence. Its great principles were so firmly imbedded in his mind that they underlay all his thinking and reading, while a wonderful memory supplied precedents with no effort on his part. The care he bestowed upon every opinion he wrote makes it difficult to select leading cases among his decisions. So far as the labor bestowed was concerned, they show equal care in preparation.

Not only were these principles of law universal in their application, untainted by local feelings or prejudices, but the style in which he clothed them was an equal tribute to the universality of literature. The old south produced few writers of eminence, although these few, like Poe, stand in the first rank. The causes are interesting, but not to be detailed here. One, of which Poe himself complains, was that the people of culture, themselves of English origin, were so conservative as to go back to English models. Shakespeare, Milton, Pope, Scott, and others of that ilk were the favorite reading, and so far as southerners wrote they could not help taking these writers as models. This had a bad effect upon the originality of southern literature, because the tendency was romantic and perhaps stilted; but it had a wonderful

effect in the formation of the style. We can trace it directly in Brickell's pure and limpid writing. It expresses the idea desired in a way that is seldom seen in law books. He attributed much to the exactness acquired in his father's printing office, and even more we may be sure it was due to the poetry and prose which was his favorite reading. He thus lived almost a double life. Whether as a lawyer at Huntsville or a judge at Montgomery, one found in his office nothing but law; at his home, one found nothing but literature. It would be difficult to say which he loved the most, and the combination made his mind a model at once of learning and clearness.

It has been said that his nature was essentially lovable. He never spoke ill of others, although in the course of his long life he might well have had occasion to do so. When once asked about some one who lived well but seemed to have no business, Brickell laughingly said that the man was not a man of means but of infinite resources. Except to prevent others from speaking ill, he never himself spoke with asperity. Some judges, and nowhere more than on the Supreme Bench of the United States, in dissenting opinions, berate their colleagues in a manner which, off the bench, might have serious consequences. Not so with Brickell. His dissent never expressed any ill-will towards the majority of the court. He dissented on matters of law alone; and yet his dissent was always earnest. He always avoided heated discussions and loved peace. It is hardly a secret that

the differences of opinion in the case of *Ex parte Hardy* led ultimately to his resignation as chief-justice, and he did not return to the bench as long as those colleagues remained. His method of work was peculiar to himself. He worked when in the humor and then worked intently; but he could not be tied down to fixed times and hours. During his first incumbency as chief-justice, the Supreme Court seldom met at the appointed hour of ten. The other justices and the bar had to await his convenience. After a while his associates thought it best to take the matter in their own hands, and after waiting a reasonable time for him they would go down and open court themselves.

His kindliness of heart was illustrated in his treatment of appeals in criminal matters. All cases were taken by justices turn about, but Judge Brickell was always willing to trade off a criminal for a civil case. In particular he disliked very much to decide a capital appeal. While adhering strictly to justice, he was always glad if there was cause to reverse. He wished no man's blood to be upon his hands.

Judge Brickell's lack of physical strength led him to be somewhat dependent upon others for the comforts of life. A negro named Tom, brought to the capitol in war times by Governor Shorter, was long an attendant upon the justices. He rendered many services to the judge, especially when Brickell lived at the capitol, and the judge became much attached to him. When Brickell resigned the bench, he was

solicitous about the welfare of the old servant, and on his return years later was rejoiced to find Tom still in the State's employ. Indeed, Tom is still living, the oldest member of the state government, in his humble way continuing the traditions of Alabama officialdom from war times to the present. In Huntsville the judge took an interest in a negro boy, making of him an amanuensis, and to some extent putting up with a good deal of indifference for the sake of the boy's own welfare.

Genial as he was everywhere, it was in his home life that his character appeared at its best. During his first term as chief-justice he had on November 29th, 1876, married Miss Mary Blassingame Glenn at Montgomery. He was much her senior but they proved very congenial. Most of their beautiful home life was spent in the pleasant old-fashioned house somewhat out of Huntsville, surrounded by large grounds, with trees and flowers. He gave much of his time to the education of the son named for him, and whom he trained up to follow the profession of law. The new firm of Brickell and Brickell began in 1899.

The domestic tastes of Judge Brickell kept him from being more of a traveler. His visits north were few, and it is not even certain that in his own state he went as far south as Mobile.

If we did not know it otherwise his clear style and choice language show that he was fond of general literature as recreation. Thus, no one better illus-

trated the perfect lawyer and yet without the one-sidedness and harshness that sometimes mark the profession.

His scholarly instincts led him into many different fields of knowledge, from all of which he gleaned rich harvests. His marvelous memory enabled him to retain all, seemingly without effort. Judge Manning, in jest, frequently referred to the voluminous records of the Supreme Court as "Judge Brickell's light literature;" but while the law was his acknowledged mistress, and a jealous one, to whom he yielded unswerving fealty, his nature was full of sentiment and poetry. He was familiar with and enjoyed most of the well-known poets, Tennyson being above all others his favorite. He never wearied of the laureate. He possessed the rare and delightful accomplishment of reading well, and often read aloud at home. Among writers of fiction, Dickens with him ranked preëminent. Hardly a year passed in which he failed to read and re-read everything that Dickens wrote. *Dombey & Son*, *Nicholas Nickleby*, *Old Curiosity Shop*, *Bleak House* and *Little Dorrit* perpetually charmed him. Indeed most of the characters of Dickens were his intimates, living and real friends. And the Carols! Never a Christmas passed without his reading them aloud. Even if absent from home, away from his own library, he would go out and buy a copy of the Carols, rather than fail to read them at Christmas time. Then on New Year's Eve, always Longfellow's

"Midnight Mass for the Dying Year" and Prentice's "The Closing Year." One of his best-loved books was Griswold's "Poets and Poetry of America," and from the time of his son's birth he never wearied of reading and repeating that lovely little poem of Henry R. Jackson's entitled "My Wife and Child."

Campbell's "Lives of the Lord Chancellors" were to him a never-ending source of interest. Indeed, he was rarely without a book in his hands. He read always until late at night and it was his unvarying custom upon awakening in the morning to reach out for some book,—one was always on the table at his bedside,—and read until a very light breakfast was brought to him. The pleasures of the table never in any way appealed to him, nor the so-called pleasures of society; but literature always.

His mother was a devout member of the Cumberland Presbyterian denomination and in that church he was baptized in infancy. During the latter years of his life he attended with his wife the Episcopal Church. While strictly speaking not a church member, a man of his sentiment could not fail to be deeply religious in thought and feeling. His charity knew no bounds,—not only the charity that dispenses liberally of worldly goods, though he was always most generous, but that charity which thinketh no evil, and is always ready to extenuate and excuse the faults and frailties of others. He was always ready with words of sympathy for the unfortunate, spoken in the gentlest, tenderest manner. He truly illustrated that

the noblest are the gentlest. His reverence for all things sacred was deep and true.

His nature was essentially loving. Thus his affection and devotion for his aged mother was touching and beautiful. She lived to be 88 years old and from his attaining manhood had no other home than his. To the day of her death, her slightest wish he regarded as more binding upon him even than law; and she fully merited all the affection bestowed upon her.

When in 1900 the final summons came, he was seated at his desk revising and preparing for publication an address he had delivered at the Circuit Court of Limestone county upon the presentation of resolutions as to the character and life of Luke Pryor, an old friend and eminent citizen. His son Robert was seated at a desk at work in the same office, but so gently and quietly did God's messenger enter that for some little time his presence was unknown. The son looked up from his desk and discovered his father's head had fallen forward. The judge was not unconscious, but paralyzed and speechless. He literally died with the harness on, as he would have wished. Two weeks he was spared to his loved ones, two weeks of anxious watching and praying, and then the end came. Had he lived just a few days longer he could have celebrated his silver wedding. On the 20th of November he passed away; the 29th was the anniversary of his wedding day.

The news was heard as with personal regret by

the bar of his own and other states. In the Supreme Court, resolutions and addresses of the most sad and earnest nature were presented, by lawyers from all over Alabama; for Mobile and the cotton country had learned to love him as did the Tennessee Valley. Senator Pettus, who had also been reared at Athens and was ever his most intimate friend, spoke with emotion, and with not less feeling spoke also a distinguished fellow townsman whom Judge Brickell had counseled from childhood and initiated into the legal profession.²⁰

It would be difficult to say whether Judge Brickell ranked higher as a man, as a lawyer, or as a judge. As all three, he was eminent. As a man, his personality must unfortunately be forgotten with the passing of those who knew him. As a lawyer he can have, like all others, but ephemeral fame. But as a judge he has written his own inscription, and the Alabama Reports during his time are his monument.

He was one who sheds honor on his state and on the Union.

²⁰ See proceedings, 127 Alabama Reports, 25.

